THE MANVILLE BANKRUPTCY AND THE NORTHERN PIPELINE DECISION

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

THE MANVILLE BANKRUPTCY AND AMENDMENTS TO THE BANKRUPTCY CODE RELATING TO THE NORTHERN PIPELINE DECISION

NOVEMBER 10, 1982

Serial No. J-97-150

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
14-590 O WASHINGTON : 1983

S521-43

COMMITTEE ON THE JUDICIARY

STROM THURMOND, South Carolina, *Chairman*

CHARLES McC. MATHIAS, Jr., Maryland
PAUL LAXALT, Nevada
ORRIN G. HATCH, Utah
ROBERT DOLE, Kansas
ALAN K. SIMPSON, Wyoming
JOHN P. EAST, North Carolina
CHARLES E. GRASSLEY, Iowa
JEREMIAH DENTON, Alabama
ARLEN SPECTER, Pennsylvania

JOSEPH R. BIDEN, Jr., Delaware
EDWARD M. KENNEDY, Massachusetts
ROBERT C. BYRD, West Virginia
HOWARD M. METZENBAUM, Ohio
DENNIS DeCONCINI, Arizona
PATRICK J. LEAHY, Vermont
MAX BAUCUS, Montana
HOWELL HEFLIN, Alabama

Vinton DeVane Lide, *Chief Counsel and Staff Director*
Mark H. Gitenstein, *Minority Chief Counsel*

Subcommittee on Courts

ROBERT DOLE, Kansas, *Chairman*

STROM THURMOND, South Carolina
ALAN K. SIMPSON, Wyoming
JOHN P. EAST, North Carolina

HOWELL HEFLIN, Alabama
MAX BAUCUS, Montana

Richard W. Velde, *Chief Counsel and Staff Director*
Arthur Briskman, *Minority Counsel*

CONTENTS

OPENING STATEMENT

Page

Dole, Senator Robert 1

CHRONOLOGICAL LIST OF WITNESSES

Parker, G. Earl, senior vice president, law and public affairs, Manville Corp., accompanied by Stephen H. Case and Michael J. Crames, counsels 7

Steinberg, Robert, counsel; Thomas Henderson, trustee; and John Sears, counsel, Asbestos Litigation Group; Robert Rosenberg, professor, New York University of Law School; Judy Gentile and Jean Manti 58

Fite, James Franklin, eastern regional director, White Lung Association 113

Feinberg, Kenneth R., Washington, D.C., counsel, Raymark Corp., accompanied by Robert B. Sims, vice president, secretary, and general counsel, Raymark Corp 139

Anderson, Eugene R., counsel, the Keene Corp., accompanied by Arthur Olick 156

Rose, Jonathan C., Assistant Attorney General, Office of Legal Policy, U.S. Department of Justice 200

Merrick, Richard L., president, National Conference of Bankruptcy Judges, and Joe Lee, chairman, committee on legislation, National Conference of Bankruptcy Judges 229

ALPHABETICAL LIST AND MATERIAL SUBMITTED

Anderson, Eugene R.:
- Testimony 156
- Letter to Senator Robert J. Dole 158
- Prepared statement 160
- Letter to Senator Robert Dole 163
  - Enclosures:
    - "Progressive Injury Insurance Coverage—Update," by Eugene R. Anderson and Lisa D. Levey 164
    - Status Report on Stays and Severances (by Jurisdiction), November 15, 1982 184

Case, Stephen H.: Testimony 7

Crames, Michael J.: Testimony 7

Dole, Senator Robert:
- Articles from the Wall Street Journal:
  - "How Johns-Manville Mounts Counterattack in Asbestos Dispute," by Neil Maxwell, June 30, 1980 3
  - "Johns-Manville Corp. Reorganization Plan Is Approved by Board," July 31, 1981 6
  - News item, October 10, 1981 6
  - "Asbestos Lawyers Ask Court To Curb Manville," by Tamar Lewin, November 9, 1982 6

Feinberg, Kenneth R.:
- Testimony 139
- Prepared statement 143

Fite, James Franklin:
- Testimony 113
- Prepared statement 115
- Exhibit 1—"Disability Compensation for Asbestos-Associated Disease in U.S.," by Dr. I. Selikoff 117

Page

- Fite, James Franklin—Continued
  - Exhibit 2—Interim Report to Congress on Occupational Diseases 123
  - Exhibit 3—
    - "3 Lung Groups Organize, Plan National Drive," by Kammie Michael, from the Durham, N.C., Herald, September 20, 1982 129
    - Resolutions adopted by the First Congress of Disabled Workers in Durham, N.C., September 17-19, 1982 130
- Gentile, Judy:
  - Testimony 58
  - Prepared statement 110
- Henderson, Thomas:
  - Testimony 58
  - Letters to:
    - Vandiver Brown, attorney, Johns-Manville Corp., New York City, from Sumner Simpson, president of Raybestos-Manhattan, Inc., October 1, 1935 62
    - S. Simpson, president, Raybestos-Manhattan, Inc., Bridgeport, Conn., from Vandiver Brown, attorney, Johns-Manville Corp., New York, N.Y., October 3, 1935 63
- Lee, Joe:
  - Testimony 229
  - Prepared statement 252
  - Responses to written questions of Senator Dole 256
    - Attachment: "Consolidated Clerks of Court Revision," Senate Report No. 95-984, to accompany S. 3107, July 13, 1978 260
  - Legislative draft 264
  - *Metlakatla Indian Community Annette Island Reserve* v. *Egan*, Governor of Alaska, 363 U.S. 555, argued May 18, 1960, decided June 20, 1960 314
- Merrick, Richard L.:
  - Testimony 229
  - Prepared statement 233
  - Answers to questions from the Subcommittee on Courts 243
    - Attachment: "Bankruptcy Crisis May Cause 300,000 Layoffs, Judge Warns," from the Chicago Daily Law Bulletin, November 18, 1982 249
  - Statement of Clerk Barbara A. Everly, U.S. Bankruptcy Court for the Northern District of Ohio, on behalf of the National Conference of Bankruptcy Clerks 250
- Parker, Earl G.:
  - Testimony 7
  - Prepared statement 15
  - "Manville: The Bankruptcy of Product Liability Law," by Richard A. Epstein, September/October issue of Regulation, AEI Journal on Government and Society 45
  - "Winners and Losers in the Manville Bankruptcy," by Jeremy Bulow, Thomas Jackson, and Robert Mnookin, from the Wall Street Journal, November 4, 1982 56
- Rose, Jonathan C.:
  - Testimony 200
  - Prepared statement 204
  - Letter to Senator Robert J. Dole, November 18, 1982 216
    - Enclosures:
      - Letter to President Ronald Reagan, from Sanford C. Sigoloff, chairman, Wickes Companies, Inc., October 29, 1982 221
      - Motion to extend stay of judgment, filed by the Solicitor General in the Supreme Court of the United States, October term 1982 223
- Rosenberg, Robert: Testimony 58
- Sears, John:
  - Testimony 58
  - Letter to Senator Robert Dole, chairman, Subcommittee on Courts, Committee on the Judiciary, from the law offices of Baskin & Sears, P.C., November 30, 1982 108
- Sims, Robert B.: Testimony 139
- Steinberg, Robert:
  - Testimony 58
  - Prepared statement on behalf of the Asbestos Litigation Group 72
    - Attachments:
      - Exhibit A: Manville settlement check not honored after bankruptcy filing 91

Steinberg, Robert—Continued
- Prepared statement on behalf of the Asbestos Litigation Group—Cont.
  - Attachments—Continued

    Page
    - Letter to Manville suppliers from John A. McKinney, chairman and president, Manville Corp., August 27, 1982 92
    - Enclosure: "Beleaguered by Asbestos Lawsuits Manville Files for Bankruptcy," copy of interview 94
    - *Dolores M. Moran* v. *Johns-Manville Sales Corp.*, court case, U.S. Court of Appeals for the Sixth Circuit, decided and filed October 26, 1982 97

APPENDIX

ADDITIONAL SUBMISSIONS FOR THE RECORD

Letters to Senator Robert J. Dole, chairman, Subcommittee on Courts, Committee on the Judiciary, from:
- Brock Adams, law offices of Garvey, Schubert, Adams & Baker, November 8, 1982 321
  - Exhibit A: Divergent results 323
  - Exhibit B: Proposed amendment 324
- James L. Kimble, senior counsel, American Insurance Association, November 10, 1982 325
- Senator Barry Goldwater 327
  - Enclosure: Letter to Senator Barry Goldwater from Virginia L. Fritz, clerk, U.S. Bankruptcy Court, District of Arizona, November 22, 1982 328
- L. Stanley Chauvin, Jr., chairman, task force on the status of bankruptcy judges, American Bar Association, November 23, 1982 334
  - Enclosure: List of the members of the Task Force on the Status of Bankruptcy Court Judges 336
- Michael Bradfield, General Counsel, Board of Governors of the Federal Reserve System, November 24, 1982 337
  - Enclosure: Draft amendments to the Bankruptcy Code regarding repurchase agreements 338
- Bill McLaughlin, chairman, Asbestos Compensation Coalition, November 29, 1982 342
  - Enclosure: "Highlights of the Occupational Disease Compensation Improvement Act," draft proposal 343
- John S. Andrews, vice president, Owens-Illinois, November 29, 1982 351
  - Attachment: Proposed addition to section 1123(b) of the Bankruptcy Code 353

Additional statements for the record submitted by:
- American Bar Association, presented by Joan M. Hall 356
- Association of Trial Lawyers of America, presented by Howard A. Specter 359
- Commercial Law League of America, presented by Joseph E. Friend, president 382
- Crum & Forster Insurance Companies, presented by Leslie Cheek, III, vice president 398
- Investment Company Institute 405
- Public Securities Association 410
- Weil, Gotschal & Manges, presented by Harvey R. Miller, on behalf of Owens-Illinois, Inc.; Celotex; Eagle-Picher Industries, Inc.; H. K. Porter Company, Inc.; Keene Corp.; Lac D'Amiante du Quebec Ltee.; Owens Corning; Pittsburgh Corning Corp.; Rock Wool Mfg. Co.; and Southern Textile Corp 421

THE MANVILLE BANKRUPTCY AND THE NORTHERN PIPELINE DECISION

WEDNESDAY, NOVEMBER 10, 1982

U.S. SENATE,
SUBCOMMITTEE ON COURTS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:40 a.m., in room 2228, Dirksen Senate Office Building, Senator Robert Dole (chairman of the subcommittee) presiding.

Staff present: Richard W. Velde, chief counsel; Douglas Comer, Sheila Bair, counsels; Patricia Brown, chief clerk; and Arthur Briskman, minority counsel.

OPENING STATEMENT OF SENATOR ROBERT DOLE

Senator DOLE. I want to welcome everybody here this morning, and I just have a brief opening statement and then we will move quickly to the witnesses.

Today the Subcommittee on Courts convenes to conduct oversight hearings on the recent bankruptcy filing of the Manville Corp., and to receive further testimony on the Supreme Court's recent *Northern Pipeline* decision.

Last August, front-page headlines were made when the Manville Corp., the Nation's largest asbestos producer and one of the 30 industrials on the Dow Jones Index, filed for reorganization under chapter 11 of the Bankruptcy Act of 1978. The filing prompted startled responses from the business community, congressional leaders, as well as the public at large. Manville was in no immediate financial distress. In fact, it had a net worth of $1.1 billion, plenty of cash on hand, and, despite the recession, its operations continued to be strong and viable. Why, then, had one of the Nation's largest corporations filed for bankruptcy?

As acknowledged by Manville's newspaper advertisements to its stockholders, the filing was prompted by increasingly serious projections of liabilities that Manville might have to absorb in the future from a flood of asbestos-related litigation.

According to the bankruptcy petition, Johns-Manville Corp. and various subsidiaries were, as of June 30, the defendants or codefendants in approximately 16,500 asbestos lawsuits. The current average cost of disposing of each claim had risen to $40,000. Outside consultants commissioned by Manville projected that 32,000 additional suits would be filed in the future. If these projections held accurate, Manville's total price tag for all asbestos litigation would be in excess of $2 billion.

The Manville Corp. is not, of course, the only corporation to seek protection in the bankruptcy courts for potential products liability. Other businesses seeking such protection include UNR Industries and the Amatex Corp., which are also asbestos producers, as well as the White Motor Co. and the State Farm Bureau Co-op.

But what made the Manville filing unique was the relative strength of its current financial situation and the fact that it relied on projections extending some 20 years in the future on which to base its claim that assets eventually would be insufficient to cover liabilities. Thus, it is no surprise that the filing was challenged as a fraud undertaken by Manville solely to avoid paying the just claims of asbestos victims.

My immediate response in a press release issued the day after the filing also questioned the propriety of the Manville filing. The fact that Manville, with assets exceeding $2 billion and hundreds of millions of dollars in insurance coverage, was seeking a chapter 11 reorganization seemed dubious and unusual, at best.

In addition, because of the recent rash of personal bankruptcy filings, our bankruptcy courts are already facing an unprecedented workload. As a consequence, I questioned whether the system could afford the additional strains placed upon it by Manville-type cases, where other remedies, both legal and congressional, might be more appropriate.

I continue to firmly believe that our bankruptcy courts cannot be used as an escape route for every otherwise solvent corporation which feels threatened by the possibility of a deluge of products liability lawsuits. Both from a legal and practical standpoint, our bankruptcy system should not become the common forum for the resolution of complex and massive tort litigation, whether it emanates from asbestos disease, plane crashes, or contaminated feed grain.

However, after close analysis, there is a possibility that the use of chapter 11, at least in Manville's case, could have certain significant advantages not only for Manville but also to asbestos claimants.

The pros and cons of the use of chapter 11 in a Manville-type situation is something I hope we can begin to explore today. To be certain, the Manville case raises a number of significant and complex issues.

First, should our bankruptcy courts be used at all by financially sound businesses threatened by potentially enormous contingent liabilities? If we are to permit this use of our bankruptcy courts, under what circumstances and how can we guard against abuse? With regard to asbestos claims specifically, though chapter 11 may offer some advantages, would it be better for Congress to enact legislation so that these cases could be handled in a manner similar to workmen's compensation claims?

A final point which must be considered relates to the second topic of today's hearings: legislation to address the *Northern Pipeline* case.

In *Northern Pipeline,* the Supreme Court held the current bankruptcy system unconstitutional because Congress delegated article I bankruptcy judges overly broad jurisdiction over ancillary issues. But if we are to permit Manville-type chapter 11 filings, it is fairly obvious that we must maintain the bankruptcy courts' jurisdiction over such issues. Under *Northern Pipeline*, it appears that a way to do this constitutionally would be to give bankruptcy judges article III status.

Two legislative alternatives have been proposed which would do just that. One proposed by Representative Rodino would create a fourth tier to our judicial system by mandating the establishment of 94 new courts of general jurisdiction, consisting of 227 article III judges to handle all bankruptcy matters and ancillary issues.

The other less drastic proposal sponsored by myself and Congressman Butler would create a bankruptcy division in each Federal district, composed of article III judges who would adjudicate all bankruptcy and ancillary matters, but also be permitted to hear nonbankruptcy cases should their dockets permit.

The proposal to create bankruptcy divisions in each district court was developed after this subcommittee received extensive testimony on the *Northern Pipeline* case. The initial draft was proposed by the Department of Justice, and we will have its key author, Mr. Rose, testify later today.

So I would just say that we have a number of excellent witnesses, and we will start off with Mr. Parker of the Manville Corp.

Before we begin with our panel of expert witnesses, I wish to place in the record some articles pertaining to the Manville bankruptcy case.

[The Wall Street Journal articles follow:]

[From the Wall Street Journal, June 30, 1980]

HOW JOHNS-MANVILLE MOUNTS COUNTERATTACK IN ASBESTOS DISPUTE

(By Neil Maxwell)

DENVER.—Hidden in the stark foothills west of here, the dull-silver and glass headquarters of Johns-Manville Corp. has a fortress-like look—and nothing could be more fitting, for seldom has a corporation found itself more under siege.

In the cavernous, window-walled office of Chairman John A. McKinney, a telescope stands vigil. It is trained on an eagle's nest across the valley, but it doesn't take much imagination to see it trained on invading lawyers out to raid the corporate coffers in behalf of several thousand clients. Or on advancing federal forces bent on making the company change its ways.

The reason for the animosity toward the giant company (1979 sales, $2.3 billion; net income, $114.6 million) is that Johns Manville is the world's largest producer of asbestos outside the Soviet Union. Because of its insulating, fireproofing and friction-producing qualities, asbestos is widely used in such products as construction materials, automotive brake linings and various consumer items. But it is highly controversial because inhalation of too many asbestos fibers can kill or maim. And in the view of vocal critics, this makes Johns-Manville and other asbestos makers killers, whose executives should be punished.

"Morally, they have more than a civil liability," says Barry I. Castleman, an environmental consultant who is active on the plaintiffs' side in asbestos litigation. Mr. Castleman believes that jail terms should be imposed "on the top corporate people responsible."

A 1978 study by three federal agencies projected that over the next 30 to 35 years. 13 percent to 18 percent of cancer deaths would be asbestos-related. Also in 1978 came a federal estimate that up to 2½ million workers breathed "significant amounts" of asbestos fibers every day.

Manufacturers insist that asbestos isn't dangerous to workers or consumers if used properly. But so many people believe themselves damaged by asbestos that they have made Johns-Manville, by its own calculation, one of history's most sued companies, with more than 3,000 suits pending and more pouring in. In California alone, an attorney says, "it's like a range war signing up clients." Many of the suits have been filed by present and former workers in shipyards, where asbestos has been used to insulate such things as pipes and boilers. (Workers in the asbestos factories themselves are covered only by workmen's compensation.)

Johns-Manville says that the cost of the more than 600 cases already disposed of has averaged only about $15,000 each—or a total of $9 million, plus about the same amount in legal costs. But some recent individual awards have topped $1 million.

BECOMING AGGRESSIVE

When Johns-Manville's troubles started mounting, it did what many companies do when adversity strikes: It let its insurers handle the legal battles and ignored hostile press treatment. But it has since started fighting back ferociously on every front. "We had no alternative but to become quite aggressive," Mr. McKinney says. "It was one of the best things we ever did."

The counterassault has been marshaled by Mr. McKinney. Until not long ago—although Johns-Manville also makes other insulation and roofing materials, pipes, and paper and wood products—he was spending 90 percent of his working time on asbestos troubles.

Mr. McKinney doesn't pull his punches. Of the scores of lawyers who have filed suits against Johns-Manville, he says: "This is the modern version of ambulance-chasing. The biggest scandal in our legal system is contingent fees, and that's what all these cases are."

Of government environmentalists and safety regulators, he says, "They are charlatans and pipsqueaks who have to go up on the Hill for their budgets and show they've slain some dragons." And he warns, "If you carry this to the extreme—and that's what the government idiots are doing—no industry is immune."

QUARREL WITH FORTUNE

The press also takes its lumps from Mr. McKinney. At a California seminar last year on media-business relations, the white-haired executive startled participants by bluntly questioning the integrity of reporters, a position he doesn't recant: "I considered them to be incompetent and dishonest," he says.

And when he doesn't like an article, he takes direct action. "We've had instances where people have a preconceived story line and we give them the facts and they still pursue the preconceived story line." Mr. McKinney says. "That's what Fortune did (in an article last year about the departure of Mr. McKinney's predecessor), and that's why we don't advertise in Fortune." At Fortune, Allan Demaree, assistant managing editor, says: "We stand behind that story 1,000 percent. After they wrote a letter to the editor about it, we checked it and could find absolutely nothing wrong."

Johns-Manville doesn't dispute clear medical evidence that asbestos can kill. There is no denying asbestosis, a scarring of the lungs similar to emphysema; mesothelioma, an invariably fatal cancer attacking the cells lining the lungs; and lung cancer.

The National Cancer Institute says that there aren't any figures available on the number of asbestosis cases and that figures for mesothelioma and lung cancer aren't broken down to indicate how many cases might be attributable directly or indirectly to asbestos. Johns-Manville says that asbestos sole role in lung cancer is to compound the danger among those who smoke.

Thanks to greater care these days in the handling and preparation of the mineral, asbestos workers face little danger, the company says. As for consumers, Johns-Manville says that asbestos fibers in today's consumer products are so sealed in that they can't be released in significant amounts. The company contends, in short, that regulators are flogging a dead horse.

Experts say, however, that dangers remain, from both current uses and old installations. The mineral is used in clothes washers and dryers, dishwashers, refrigerators, portable heaters, potholders, popcorn poppers, and pipe and air-duct insulation.

Still considered culprits are the many high-rise office buildings whose ceilings contain work spaces with asbestos insulation. "The exposure of the future is from what's in place now," says Dr. William J. Nicholson, an asbestos expert at Mt. Sinai School of Medicine in New York. "Simply stringing a phone line can pose a problem," he says, "because the asbestos dust (in work spaces) gets stirred up and distributed through the air-duct system."

"NOBODY QUOTES PAUL"

Johns-Manville says it stands ready to dispense the truth about asbestos through a team of Johns-Manville medical experts headed by Dr. Paul Kotin, but "nobody quotes Paul," Mr. McKinney laments. "Instead, they'll go out and quote some pipsqueak from the government."

What Dr. Kotin says is, "Sure, there can be danger, like verything in the environment, but if it is used appropriately, so that there is low airborne fiber content, there is no danger." He says that the mortality rate among asbestos workers today is average and that the government is basing its antiasbestos campaign on the way things were 35 years ago.

Unquestionably, things were far from ideal back then. In fact, some lawsuits assert that Johns-Manville was guilty of a corporate cover-up. In the files of another asbestos maker, Raybesos-Manhattan Inc., investigators turned up a note from a Johns-Manville doctor about a 1949 survey at a Johns-Manville mine in Canada. The note, from Dr. Kenneth Smith, later Johns-Manville's medical director, said the survey of 708 workers had found seven with asbestosis. It added: "They have not been told of this diagnosis, for it is felt that as long as the man feels well, is happy at home and at work and his physical condition remains good, nothing should be said."

The company denies a cover-up. "Think about it," says attorney D. H. Markusson. "How many times have you known cases in your own experience who developed cancer or heart disease and they weren't told? Based on the mores of 1980, Ken Smith should have told those seven people." But given the tenor of the times, he adds, "I don't know if he should have or not."

DISPUTE OVER STANDARDS

Several government agencies are adding to Johns-Manville's troubles by attacking asbestos dangers both in mining and manufacturing and in consumer products. Current regulations allow two fibers of asbestos per cubic centimeter of air, and Johns-Manville argues there isn't any reason to lower that. "We have no question that standard is completely safe." Mr. McKinney declares. He says that it has been used in a California plant for more than two decades with no evidence of asbestos-related disease.

Yet the government is talking about lowering that standard to one fiber per cubic centimeter or even lower. "Nobody can meet that standard because you can't even measure it," Mr. McKinney says, "Tony Robbins and those charlatans at NIOSH are implying that there is no safe level, but that's just nonsense for headline-getting purposes."

NIOSH is the National Institute of Occupational Safety and Health, which does research and makes recommendations to OSHA, the Occupational Safety and Health Administration. Dr Anthony Robbins is OSHA's director, and he agrees in part with Mr. McKinney. "In effect," Dr. Robbins says, "we want to say there is no acceptable exposure level to asbestos. The ideal would be to not add any more asbestos to the atmosphere, except for essential uses."

What are essential uses, "We are prepared to be convinced there are some," he says, "but we aren't aware at the present time of any where substitutes couldn't be developed." He says the "essential" use most mentioned is brake linings; but a spokesman for Bendix Corp., which makes such linings, says, "By decree of the chairman, we will be out of the use of asbestos at the earliest possible date in this decade."

Johns-Manville's asbestos sales are already suffering because of the recession, the housing slump and scary headlines. Sales overseas have been good, but Susan King, head of the Consumer Product Safety Commission, was in Paris recently on a mission that could hurt. She was helping to set up an international agency to warn consumers of product dangers.

"If consumer products are banned in the U.S., we at least want importing countries to know about it," a spokesman for the U.S. agency says.

Johns-Manville says it will emerge from the legal wars unscathed because of its insurance coverage, which it puts at $400 million. But most of the insurers say they should have to pay only claims filed during their policies terms, while the company says they should also have to pay workers who were exposed during the policy period but became ill after the policy expired; that would spread the risk for each period over more insurers. Johns-Manville has sued over this, and ruling against it, Mr. McKinney concedes, would means "significantly less" coverage.

[From the Wall Street Journal, July 31, 1981]

JOHNS-MANVILLE CORP. REORGANIZATION PLAN IS APPROVED BY BOARD

DENVER.—Johns-Manville Corp. said its directors approved a reorganization plan that involves forming a parent company, Manville Corp., with five operating subsidiaries.

Johns-Manville holders will receive Manville Corp. shares for each share held. Holders will be asked to approve the formation of Manville Corp. Oct 29. However, the new operating structure will take effect tomorrow.

John A. McKinney, chairman and chief executive officer, said the new structure is a "fundamental change," dividing operations by assets rather than by markets. "This new approach will improve our ability to manage the assets for improved returns," Mr. McKinney said. "Additionally, placing well defined asset groups under separate operating subsidiaries will make it easier both internally and externally to understand and follow the progress of the businesses."

He added that "Consolidating all of the operations which produce or consume asbestos fiber in one subsidiary will make possible a coordinated policy for successful continuation of the asbestos business."

Asbestos operations will be part of a new unit to be named Johns-Manville Corp., which also will handle pipe, roofing manufacturing and industrial specialties. Manville Forest Products Corp. will be identical to the existing forest products group, a spokesman said.

Other new subsidiaries will be: Manville Building Materials Corp., with glass fiber manufacturing, building systems production and marketing and consumer building materials marketing operations: Manville Products Corp., with industrial products marketing, filtration and minerals production and marketing, and Holopane lighting production and marketing operations, and Manville International Corp., with responsibility for foreign operations and for exporting domestically produced goods.

[From the Wall Street Journal, Oct. 10, 1981]

Johns-Manville Corp. shareholders approved a reorganization of the company into a new parent concern, Manville Corp., and five separate operating subsidiaries. Richard Van Wald, Manville's general counsel, said the asbestos lawsuits against the company are increasing at a rate of about 400 a month. He said the average damages sought by the suits filed this year were $23,500 per plaintiff. He said 8,000 suits have been filed by about 13,000 plaintiffs. The suits involve claims by workers that asbestos building materials made by the company caused lung disease.

[From the Wall Street Journal, Nov. 9, 1982]

ASBESTOS LAWYERS ASK COURT TO CURB MANVILLE

(By Tamar Lewin)

Lawyers representing thousands of workers who have initiated asbestos-related suits against the Manville Corporation asked the Federal Bankruptcy Court in Manhattan yesterday to set aside Manville's bankruptcy petition on the ground that it was filed in bad faith and was an abuse of the bankruptcy procedure.

In response, Manville said that its filing was "appropriate and necessary" and it was confident that the court would uphold the company's position. Manville also said that yesterday's action had been expected.

Manville, the world's largest asbestos company, filed for protection from its creditors under Chapter 11 of the Federal bankruptcy laws on Aug. 26, asserting that its financial health was threatened by the flood of litigation it faces from workers who have developed asbestosis, mesothelioma or other lung diseases as a result of their workplace exposure to asbestos.

The workers' lawyers asserted that it was an abuse of the bankruptcy system for a financially sound company such as Manville to try to avoid its liability. They charged that the company had knowingly exposed the workers to a dangerous substance.

POLICY OF COVERING UP

"I would bet that when Manville comes up with its reorganization plan, it will offer Morgan Guaranty a hundred cents on the dollar, but considerably less than that on the debts is owes its injured workers," said Stanley Levy, one of the lawyers, for the workers. "I think the bankruptcy court will look at Manville's financial position, combined with its 50-year-old policy of covering up the hazards of asbestos, and find that the bankruptcy filing was made in bad faith and should be dismissed."

Because of the unusual nature of the Manville case, the bankruptcy court established two spearate creditors' committees, one consisting of bank, insurance and trade representative who were owed money at the time of the filing, and the other made up of representatives of the workers who have asbestos-related claims against Manville.

It is the second committee, the asbestos litigants' committee, that has asked the court to set aside the Manville bankruptcy filing. This group also said yesterday that it planned similar actions against UNR Industries and the Amatex Corporation, both of which have also filed for Chapter 11 protection.

NO OFFICIAL POSITION TAKEN

The other committee, known as the trade creditors' committee, has taken no official position on whether Manville should be allowed to shelter itself in bankruptcy court, but will be considering the question before Dec. 9, when the case is scheduled for argument before Judge Burton R. Lifland.

While it is not unheard of for a bankruptcy filing to be set aside on the ground that it was filed in bad faith, it is not clear exactly what would constitute bad faith in the Manville case, since it is such a novel use of the bankruptcy laws.

The case is further complicated by the fact that, unlike its predecessor, the 1978 Bankruptcy Act contains no specific requirement of good faith—and, indeed, no bankruptcy case has been dismissed on the ground of bad faith since that law went into effect.

"This goes to the heart of the Manville filing," said Jack Gross, one of the lawyers on the trade creditors committee. "There's going to have to be a very searching examination of the law, and whatever the decision is in bankruptcy court, it will be appealed. There are two possible ways to attack the Manville filing. It could be found to be improper either because it was based on incorrect epidemiological or actuarial studies about how many claims Manville actually faces, or it could be no good because there is no way to put through a reorganization plan that would contain the asbestos litigation."

Both propositions, he added, would require a great deal of study.

MORE DATA TO BE SOUGHT

Thomas Henderson, one of the asbestos workers' lawyers, said the litigants' committee would soon be asking Manville for further information regarding the company's filings with the Securities and Exchange Commission on the subject of potential asbestos-related liability.

The asbestos workers' lawyers also said they were challenging many of the assumptions underlying the epidemiology report Manville relied on to show that the company would be ruined by the financial demands of the asbestos litigation expected in coming years.

The petition said that Manville's assumptions about the cost of future litigation did not take into account the possibility of adopting a more cost-efficient approach—such as paying out legitimate claims quickly instead of conducting an aggressive, protracted defense.

Manville has said it currently faces more than 16,000 asbestos-related lawsuits, and could ultimately be confronted with 52,000 suits that could potentially cost more than $2 billion.

"We obviously think the filing was appropriate and necessary, and we expect that the bankruptcy court will agree with us," said G. Earl Parker, Manville's general counsel.

Senator **Dole**. Mr. Parker, please proceed.

STATEMENT OF G. EARL PARKER, SENIOR VICE PRESIDENT, LAW AND PUBLIC AFFAIRS, MANVILLE CORP., ACCOMPANIED BY STEPHEN H. CASE AND MICHAEL J. CRAMES, COUNSELS

Mr. **Parker**. Thank you, Senator Dole. With me today are Manville's outside cocounsel in this chapter 11 proceeding: Mr. Stephen Case, partner in the law firm of Davis, Polk & Wardwell; and Mr.

Michael Crames, partner in the firm of Levin & Weintraub & Crames.

Mr. Chairman, Manville Corp. appreciates the opportunity to appear before the Subcommittee on Courts this morning. In light of the areas of interest expressed to us by your staff, our formal remarks this morning will begin with a brief description of the overwhelming asbestos health product liability litigation which confronted Manville and created the necessity for its chapter 11 petition.

Today, there is little doubt that excessive exposure to airborne asbestos dust can cause disease where worksite controls are not adequately enforced. This knowledge did not crop up overnight. The public literature has reported cases of asbestosis since the 1930's, and the asbestos industry reacted to those reports by cleaning up its plants and by sponsoring additional medical studies to develop knowledge on the subject.

What was not established until much later—1964, in fact—was that workers exposed to finished products—products containing usually less than 15 percent asbestos—were at an increased risk of contracting disease. Since this initial finding by Dr. Selikoff in 1964, a number of researchers have published data that may help to define the parameters of the asbestos disease tragedy.

This research indicates that between 82,000 and 240,000 persons may contract asbestos-related diseases over the next 20 to 30 years. Independent research commissioned by Manville Corp. places the number of future disability cases at up to 130,000. Of that number, we estimate that a total of 52,000 claims are expected to be filed against Manville Corp.

Prior to our chapter 11 proceeding, asbestos health lawsuits were being filed against Manville in almost every jurisdiction of the country at an average rate of three cases per hour, every hour of every business day.

The underlying asbestos litigation is complicated by the confluence of several factors: the long latency periods associated with asbestos diseases themselves; the evolution of more sophisticated medical knowledge throughout this century; and what Chicago University law professor Richard Epstein called, in a recent American Enterprise Journal article, the "radical shifts in legal doctrine," again over an extended period of time from first injurious exposure to the manifestation of disease.

Epstein capsulized the legal dilemma when he said:

> The retroactive nature of the duty not only renders the judicial exercise pointless as a matter of deterrence, but also imposes on the firm the impossible task of complying with a liability rule of which it could not have had any knowledge.

Mr. Chairman, I would ask that the whole of Professor Epstein's article, titled "Manville: The Bankruptcy of Product Liability Law," be included with my remarks as a part of this hearing.

Senator DOLE. It will be made a part of the record.

Mr. PARKER. The specific set of circumstances that faced Manville prior to its chapter 11 filing has been well documented. The corporation had disposed of 3,500 lawsuits and was defending an additional 16,500 suits. Our own estimates projected another 32,000 such suits would be filed between now and the end of the century.

Our product liability insurers, except for one, consistently declined to honor their policies with Manville, thus depriving the corporation of an estimated $500 to $600 million in insurance coverage. Our independent auditors had qualified our financial statements and, as you know, the effects of a qualified audit report on a major corporation are significant and adverse.

Simply put, our problem is that we do not believe we can earn enough money to pay all of our asbestos health liabilities when due, presenting a classic case of equity insolvency, equity insolvency being defined as a situation in which assets are not available to cover debts as they come due. That was the foundation of our chapter 11 filing. This is precisely the kind of circumstance for which the chapter 11 remedy was designed by the Congress.

Mr. Chairman, we do agree with your position that there must be a better way to resolve asbestos health disputes. As early as 1975, our company began to work with appropriate Federal legislators to construct a more rational, efficient, and exclusive remedy for asbestos health injuries. We intend to continue those attempts and, if successful, would hope to weave the results of legislation into the very fabric of our chapter 11 reorganization plan.

But absent congressional action that would resolve these disputes for all parties, Manville is determined to resolve its own liabilities in a manner that is fair to all of our valid creditors, including present and future asbestos claimants.

If, rather than file for chapter 11, we had attempted to create a large reserve, our loan agreements would have gone into default. We could not have raised the money to pay off our defaulted loans unless we mortgaged our assets. Had we done this, while our commercial creditors could probably have been assured of receiving 100 percent payments, the assets available to pay asbestos claims would have been dramatically diminished. The first creditors to sue and obtain judgment would have recovered in full, to the irreparable detriment of future claimants. So, chapter 11 became the only vehicle by which Manville creditors, under the supervision of the court, could be treated in an evenhanded way.

As a Wall Street Journal article noted last week, Mr. Chairman:

> Unfortunately, there are not enough assets available in Manville to compensate all victims fully. Moreover, the bankruptcy filing does not change that unpleasant fact. Indeed, bankruptcy may increase the pool of assets available to victims. The clear effect of bankruptcy will be to allocate this pool more evenly among asbestos victims. While currently identified victims may lose in the process, the as yet unidentified victims, and perhaps the class as a whole, will gain.

I would like also permission to include that article, entitled "Winners and Losers in the Manville Bankruptcy," for the record.

Senator DOLE. It will be made a part of the record.

Mr. PARKER. To facilitate resolution of the asbestos-related claims in the context of our chapter 11 case, Mr. Chairman, it is extremely important that no cloud be placed over the capacity and power of the bankruptcy court to deal with the many issues that come before it.

Toward this end, we would commend to this subcommittee the prompt enactment of legislation constituting the bankruptcy courts as article III courts.

In testimony before the House Subcommittee on Labor Standards, we related the nature of the Federal Government's involvement in the acts and omissions giving rise to the disease problem we confront. We believe that a Government contribution to the compensation of injured workers is consistent with the long history of this Government's responsible, compassionate concern for persons injured in its service.

We are convinced that unless the Government shoulders its fair share of this burden, many disabled citizens will be denied any assistance.

Mr. Chairman, I would conclude by saying that Manville's experience with the personal injury litigation system as a method of paying disabled workers has been overwhelmingly unfavorable.

In the context of a massive occupational health disaster such as that posed by asbestos disease, mass tort litigation is a terrible way to deliver benefits. Too much of the money which could go to compensate disabled workers is wasted in legal costs of all kinds. We have seen wildly inconsistent and irrational litigation results that are inevitable in a system based upon findings of fault, and those findings based upon acts going back decades.

It is a system in which juries are asked to choose between the law as it existed when the injurious exposures occurred; the law as it now exists, ignoring the questions of foreseeability; and the needs of truly injured workers. It is also a system in which an increasing number of plaintiffs receive sizable sums despite having no demonstrable injury or disability.

Mr. Chairman, Congress possesses the authority to legislate a satisfactory solution to the asbestos health tragedy. Many legislative proposals have been advanced, and we would respectfully urge this subcommittee to consider those carefully.

No matter how fast Manville is able to conclude its chapter 11 proceedings, or either of the other two asbestos companies are able to work out their proceedings, Congress can and should resolve them faster with appropriate legislation applicable to all of the parties involved.

We believe that Congress will act to resolve this asbestos issue, which affects products liability law, workers' compensation law, court procedures and Government responsibility. We hope to continue to assist in seeking an overall solution to this national tragedy of occupational disease. At the same time, we shall continue to seek to resolve our problems through the use of chapter 11 which, we are convinced, offers the best hope of fair treatment to all the parties involved.

That concludes my remarks this morning. My associates and I are available for questions that you may have, sir.

Senator DOLE. Let me indicate that Congress probably has the ability to find some solution, but I am not certain this committee has the jurisdiction. We have jurisdiction of bankruptcy and maybe a consolidation of class actions, but beyond that, I am not certain whether this would be the committee that would try to determine how to proceed.

But I think there are, as I have indicated, a number of bills pending and there has been a lot of discussion about how we might proceed in Congress.

How much has Manville paid out so far in asbestos cases?

Mr. **Parker**. I do not have a total figure on that, but in 1981 and thus far in 1982, the figure was $40 million; that was payment and settlement in satisfaction of judgments. Prior to 1981, the payments were made by our first level of insurance coverage and I do not have a total figure on that, sir.

Senator **Dole**. Now, I know you have brought suits against several insurance companies in recent days for their failure to honor their contractual obligations for coverage between $500 and $600 million. I understand from the insurance companies that the big problem regarding their participations is that the issues in which insurance companies should pay are the subject of conflicting opinions in four different courts.

Are we not going to add another layer of confusion with what you are doing under chapter 11?

Mr. **Case**. I would have thought not, Senator. It might be possible to help resolve Manville's problems with insurance if we had article III status for the bankruptcy court. We might be able to use the removal provisions of the bankruptcy code and have the matters litigated there more expeditiously than they have proceeded in the State courts.

I think ultimately the complicated legal issues involved in the construction of these policies will have to be resolved by the Supreme Court. If we move quickly, we might be able to produce the case in which the Court would grant certiorari and hear.

Mr. **Parker**. It might be worth pointing out that while the decisions of the four courts of appeals are conflicting in some respects, there is one consistent strain in all those decisions, and that is that the decisions granted the maximum insurance coverage to the manufacturing company in each case. At least we can see that consistency in the courts opting to provide maximum coverage and availability of money to the injured parties.

Senator **Dole**. In 1978, Congress abolished the court good-faith test for debtors seeking protection under chapter 11 of the bankruptcy code. If the test were still on the books today, could Manville obtain protection under chapter 11?

Mr. **Parker**. No doubt about it, sir. We were faced with an equity insolvency situation. We had a contingent liability which was very well established, probable losses could be estimated, and we could determine that our assets were not sufficient to meet our future claims as they fell due. So, I have no hesitancy whatsoever in telling you that not only was the filing made in good faith; it was, for us, the only route left available.

Mr. Crames?

Mr. **Crames**. I would like to add something to that, if I may, Senator. The alternative to chapter 11, as Mr. Parker pointed out, would have been a gradual and piecemeal dismemberment of the businesses of Manville, probably to the betterment of today's creditors but to the irreparable detriment of tomorrow's creditors.

As far as good faith itself is concerned, as I am sure you know, the former chapter 11 contained no such requirement; former chapter 10 did. The courts have grafted a good-faith test upon the cases filed under the chapter, and basically have defined good faith as meaning a reasonable prospect of succeeding in the reorganization effort, to wit that the business is viable and has a good chance of succeeding.

It was precisely to insure the viability of the company that the chapter 11 had to be filed when it was. It would not have been viable, or not nearly so viable, as we progressed month after month in the course of litigation.

Senator **DOLE**. Mr. Parker, you mentioned that the Government should pay their fair share. What do you have in mind? What should the Government do, assume your liability? Is that what you really want us to do in the final analysis?

Mr. **PARKER**. Not at all, sir. We would like for the Government to recognize its liabilities in this episode. The largest number of asbestos-injured persons were injured in the shipyards of World War II and the Korean War. There was a bedlam of activity there—frenetic activity, in which the Navy was insisting on asbestos insulation as a matter of military necessity.

The Government had requisitioned all domestic supplies of asbestos. It was not possible for private industry to use asbestos for anything other than defense-related efforts without Government approval. The Government was in control of the shipyards and specified and controlled the standards in which the work was undertaken.

We think that there is ample and consistent provision in the Government's history for providing compensation to people injured in similar circumstances in Government service, including civilian employees of Government contractors working in foreign lands on similar projects.

I think if we can provide compensation for foreigners injured in our service, we can certainly do no less for our own citizens who were engaged in a military, defense-oriented operation under the control of the Government, doing Government-specified work.

Mr. **CASE**. Senator, you will recall they were building liberty ships during World War II at the rate of one every 30 days. As I understand it, the particular product that caused the injury in the shipyards was a molded insulation that used to be cut by hand outside the shipyard.

To get the liberty ships built and the battleships refitted, they were cutting it inside the holds of the big ships, which were not ventillated, using power tools. Professor Epstein's article found a case decided in 1942 where it was part of the fact record that the injured man had come out of the ship every day so covered with asbestos dust that he looked like a polar bear.

There was an extremely unsafe environment in these Navy and Government-controlled shipyards and they threw caution to the winds to help win the war. If these were treated strictly as private shipyards, the Government would have a substantial share of the tort liability the same way Manville does.

The Government problem, as I see it, is that the Government uses its sovereign immunity defense and does not come to the table to bear its equal share or appropriate share of the costs with all the other codefendants. We are not asking for a Chrysler or Lockheed-style bailout. I think what we are really looking for is for the Government to address in some way the responsibility that it would have if it were a private shipyard operator and played by the same rules that we have to.

Senator **Dole**. Well, again, I think that is a matter we probably cannot resolve in this committee, but it is one that I assume will be discussed. The Federal Government does incur indirect costs through a number of programs not directly related—such as welfare, Social Security, and other programs, where victims are compensated.

But I understand your point. Again, it is a matter we do not have jurisdiction of. What is going to happen to your case if we do not act by December 24 in Congress on the issue of the bankruptcy judges' jurisdiction?

Mr. **Crames**. There have been, as you know, various proposals made, including a proposed rule from the judicial conference, which we believe, and other people knowledgeable in bankruptcy believe, is less than satisfactory to say the least.

We think clearly that there should be article III status given to the judges, not just because of the Manville case, but because of the enormous issues and the huge sums that come before bankruptcy courts across the country.

If legislation were enacted short of that, perhaps along the lines of what has been suggested as divisions, if you will, under the aegis of the district court, presumably district court judges could deal with these jurisdictional questions. However, they already have full burdens of their own, which is why we consider that to be a less satisfactory solution than broad article III status.

Mr. **Case**. Senator, Manville wants to find an efficient way to deliver benefits to disabled workers. I believe we can get there much sooner in chapter 11 if the judge has full article III powers.

Senator **Dole**. We are working on that. We might do something in Congress this year.

I think I have just one additional question. In July 1981, the directors of your company approved a reorganization plan that involved forming a parent and five operating subsidiaries. This reorganization was approved by your shareholders by the end of October. What effect, if any, has this reorganization had on the product liability litigation?

Mr. **Parker**. The reorganization was done for the purpose of putting related assets into separate subsidiary corporations and establishing separate management for those subsidiaries. We think it is a more efficient method of managing our businesses for productivity——

Senator **Dole**. Does it also insulate nonasbestos assets and earnings from asbestos judgments?

Mr. **Case**. Senator, that may become an issue in litigation which we would not want to prejudice by discussion here. But if I may, I would say that every single one of those assets that was moved in that reorganization is subject to Judge Lifland's jurisdiction. Whatever the result may be of any effects of that reorganization, he has power over all the assets.

Mr. **Parker**. Especially all of our U.S. and Canadian corporations that were filed in the chapter 11 proceedings.

Senator **Dole**. I may wish to submit, Mr. Parker, a few questions in writing, but we have a number of witnesses and we have somewhat limited time today. So we appreciate very much your testimony.

[The prepared statement of Mr. Parker and material submitted for the record follow:]

STATEMENT OF

G. EARL PARKER
SENIOR VICE PRESIDENT
LAW AND PUBLIC AFFAIRS
MANVILLE CORPORATION

BEFORE THE SENATE
SUBCOMMITTEE ON COURTS

NOVEMBER 10, 1982

Good morning, Mr. Chairman. I am Earl Parker, Senior Vice President of the Manville Corporation. Accompanying me today are Manville's outside co-counsel in its Chapter 11 proceeding, Mr. Stephen H. Case, a partner in the law firm of Davis Polk & Wardwell, and Mr. Michael J. Crames, a partner in the firm of Levin & Weintraub & Crames.

Mr. Chairman, Manville Corporation appreciates the opportunity to appear before the Subcommittee on Courts as it considers legislation to amend the nation's bankruptcy laws and to institute much-needed court reforms. I understand that you are most interested in receiving testimony from Manville regarding the corporation's need to file for Chapter 11 protection in the face of the overwhelming asbestos-related product liability litigation confronting it. Given the necessarily limited time we have to discuss this subject, my comments this morning will give only minor consideration to the larger and basic issues that are involved in your deliberations: the question of Article III status for bankruptcy judges, and the several other issues posed by S. 863 and the Chairman's amendment proposing an "Omnibus Bankruptcy and Court Improvements Act."

Mr. Chairman, Manville Corporation employs over 25,000 people worldwide, with 15,000 of these in the United States. With annual sales of $2.2 billion, Manville is a diversified, worldwide timber, minerals, and manufacturing corporation with major businesses which include fiberglass products, wood and paper products, non-fiberglass insulations, pipe products and systems, roofing products, and industrial and specialty products. Manville also mines asbestos fiber and manufactures asbestos-containing products, and it is this latter involvement that provides the basis for our being here today.

Today, there is little doubt that excessive exposure to airborne asbestos fiber can sometimes cause disease, principally of the respiratory tract. The diseases now known to be associated with prolonged asbestos exposure include asbestosis, a scarring of the lung; and two forms of cancer, bronchogenic (or lung) cancer and mesothelioma. Tragically for many workers, it has taken decades for the medical/scientific community, industry, and the government to obtain the broad knowledge we have today. The public literature has reported since the 1930's that factory workers exposed to 100 percent raw asbestos fiber experienced an increased risk of contracting a pulmonary fibrosis that has come to be called asbestosis. But there was no reason to believe that _any_ worker faced a health risk from using finished asbestos products, and there was no reason to believe that workers faced any health risks other than asbestosis. All this changed over time, of course. The asbestos industry sponsored medical research seeking to better understand the problem; the U.S. Government told us first in 1938 that if we limited worker exposures to 5 m.p.p.c.f. then asbestosis would not be a problem, and then the Government told us in 1946 that shipyard pipe insulation work "was not a dangerous occupation." But in 1964, these established notions regarding asbestos disease collided violently with the release of a study undertaken by Dr. Irving Selikoff of Mt. Sinai Hospital in New York. Dr. Selikoff reported that workers exposed to some finished asbestos products -- products that had left our manufacturing plants to be used by our customers -- could also be a potential hazard.

The implications of the Selikoff study were tremendous. Not only were our employees exposed to an increased risk of disease, but potentially vast numbers of our customers' employees might be at an increased risk as well! In fact, while there is no definitive work on the subject, several researchers have since tried to quantify the dimensions of the asbestos health tragedy. In this regard, it has been reported that:

- Dr. Philip Enterline estimates there will be approximately 4,100 excess cancer deaths attributable to asbestos in each of the next twenty to thirty years;
- Dr. J. Higginson estimated in 1980 that there are 4,000 excess cancer deaths attributable to asbestos occurring each year;
- Drs. Hogan & Hoel estimate that there may be approximately 12,000 asbestos-related cancer deaths annually, that the majority of these deaths will occur

in the 1980's, but that such deaths will continue for at least the next 30 years;

- Dr. Selikoff estimates that there will be between 8,500 and 12,000 excess cancer deaths attributable to asbestos in each of the next 20 years.

So if these researchers are correct, there is a predictable universe of asbestos-disease victims, ranging from 82,000 (Enterline) to 240,000 (Selikoff) persons, each of whom could seek compensation for their injuries.

Frankly, Mr. Chairman, Manville was not confident that any of these previous studies provided the Corporation with the guidance we required to estimate the extent of the contingent liabilities our public corporation might face. And we believed it was essential that we try to understand the scope of the asbestos disease problem --- both from a worker health perspective and because our auditors would not remove their qualification of our annual report (first imposed in 1980) until we could forecast our asbestos-health liabilities. The effects of a qualified report on a public corporation are significant and adverse. Many investors will not purchase any securities from or make any loans to any company whose audit report is qualified. Other investors will do so only at premium rates. Our investment banking advisors told us that, until our asbestos-health claims were resolved, there was simply no way for Manville to raise any significant amount of expansion capital anywhere in the world capital markets. In this competitive era, no capital for growth means no future for the company.

So, Manville contracted with two independent consulting firms to determine the future incidence of asbestos diseases, and to deduce from that the number of new lawsuits we could expect to receive in the years to come. The former task, that of determining disease incidence, was fulfilled by Dr. Alec Walker, a faculty member of the Harvard School of Public Health, acting in this case as a consultant to Epidemiology Resources Inc. (ERI), a Cambridge, Massachusetts consulting firm specializing in mass disease problems.

Dr. Walker's report concludes that between now and the year 2009, we will experience almost 138,000 asbestos disease victims. Based upon internal empirical data, corporate personnel then translated this incidence of disease into likely tort suits. Our conclusion from this phase of the research was that Manville could expect a minimum of 32,000 additional asbestos litigations (or a total of 52,000) through the year 2001. Mr. Chairman, I would ask that copies of the ERI study and related graphics be made a part of this hearing record for the Subcommittee's review.

One of the unique things about asbestos disease, however, is the extremely long latency periods associated with it. In other words, the symptoms or manifestation of any disease generally do not appear until 10 - 40 years after excessive exposure. As a result, the asbestos health litigation we see today is largely the result of the excessive exposures that occurred as long ago as the 1930's and 1940's -- well before there was medical evidence of any risk to most of the workers exposed, and certainly well before the evolution of the legal theories under which many of today's lawsuits proceed. In fact, Mr. Chairman, the American Enterprise Institute's Journal on Government & Society carried an excellent summation of the bind in which asbestos producers find themselves today. Entitled "Manville: The Bankruptcy of Product

Liability Law", the AEI article argues persuasively that it is "radical shifts in legal doctrine and medical knowledge" that account for the present state of mass tort litigation. And from a lawyer's perspective, the article establishes the legal dilemma: "The retroactive nature of the duty not only renders the judicial excercise pointless as a matter of deterrence, but also imposes on the firm the impossible task of complying with a liability rule of which it could not have had any knowledge." Mr. Chairman, I would ask at this time that the entire article I have referred to be included for the record with my written submission.

The specific set of circumstances facing Manville Corporation prior to its Chapter 11 filing has been well documented. The Corporation was a defendant in approximately 16,500 asbestos health cases pending all around the United States. We were being sued in almost every jurisdiction possible, and at a rate of three times every business hour of every business day. Attendant to our affirmation of the ERI studies I mentioned, came the question of adequate disclosure to investors, in compliance with the standards of the accounting profession and the rules of the SEC. Even after receiving the full amounts we are claiming under our applicable insurance policies, Manville simply could not afford to pay the entire bill. As an article in last week's

Wall Street Journal "Winners and Losers in the Manville Bankruptcy", November 4, 1982 (attached), indicated:

> The human tragedy is that there are so many victims of asbestos-related diseases. Unfortunately, there are not enough assets available in Manville to compensate all victims fully. Moreover, the bankruptcy filing doesn't change that unpleasant fact. Indeed, bankruptcy may increase the pool of assets available to victims. The clear effect of bankruptcy will be to allocate this pool more evenly among asbestos victims. While currently identified victims may lose in the process, the as-yet-unidentified victims, and perhaps the class as a whole, will gain.

Mr. Chairman, we testified to this effect on September 9 before the House Subcommittee on Labor Standards, and in the interests of time would ask that that testimony be made a part of these proceedings. A summary of that testimony would demonstrate that:

first, we were compelled to manage and defend 16,500 tort cases at one time, as Professor Epstein's article points out in the context of a rule of law of which no one was aware when the injurious exposures took place;

second, at our current disposition cost of $40,600, the cost of establishing a reserve for our contingent liabilities is beyond the Corporation's means as a practical matter;

third, contributing to this situation was the fact that our insurers have systematically refused to honor their contractual obligations, in the amount of roughly $500-600 million (not including defense costs) that Manville believes is available to it.

fourth, the federal government has refused to accept its proper share of the responsibility for compensating asbestos disease victims injured as a result of the govenment's own sales, employment, and specifications activities.

A short comment regarding the last two items is appropriate. With respect to our insurance disputes, Manville in 1980 initiated a lawsuit in California seeking judicial clarification of the policy language in question. The Manville suit was merged with similar actions involving other asbestos case defendants, and a judge was appointed to hear the case.

For a variety of complex and procedural reasons, that judge was removed and another appointed in his place. A few weeks ago, this second judge excused himself from hearing the case, leaving us substantially without redress after over two and one-half years of proceedings. The failure of our insurance carriers to provide interim funding -- even on a basis fully reserving their rights in the event of a judicial determination favorable to their position -- was a major contributing factor to the economic realities which compelled Manville to file Chapter 11.

Regarding the U.S. Government's responsibilities to asbestos-disease victims, the Justice Department has testified that it believes it has no liability since it pays FECA benefits for injuries incurred by its own employees. It implies that the asbestos tort litigation would go away if private industry would simply pay its own employees. The simple fact is, Mr. Chairman, that the Government's argument is slight of hand. Manville and other asbestos manufacturers already pay their own employees workers' compensation benefits. The overwhelming majority of people suing Manville today, were never Manville employees.

Perhaps more to the point, however, is the overwhelming evidence establishing the U.S. Government as the chief architect of the asbestos policies that governed the World War II years, and its own activities as a seller of asbestos fiber. As recently as two months ago, the GSA offered for sale another 9,133 tons of asbestos, and nowhere is this activity accounted for in the asbestos litigation we see today.

Finally, as a matter of social responsibility and public policy, we are hard pressed to understand the Government's posture. Generally, where U.S. citizens have been harmed as a result of the Nation's war efforts, the Government has responded with a full array of generous benefits. Members of the armed services killed or disabled are entitled to medical care from the Veterans Administration in addition to separate basic monthly benefits. Civilians suffering damage by armed forces personnel at any time are entitled to compensation from the Government of up to $25,000 (10 U.S.C. Sec. 2733, 2734).

The Government even offers compensation to overseas employees of its contractors -- whether or not they are U.S. citizens -- who are injured, on or off the job, by a "war-risk hazard." (42 U.S.C. Sec. 1701) Surely asbestos workers injured in the nation's shipyards providing the means of national defense are entitled to no less! What we have long sought in this regard is not special treatment. We ask simply that the federal government, as a primary actor in causing asbestos diseases, assume its share of the burden for compensation.

In light of the above, Manville's petition for Chapter 11 protection was clearly warranted. Our situation is analogous to the position that Penn Central Railroad found itself in a little over a decade ago. In that instance, Penn Central was "in the black" by $3 billion when it filed for reorganization in 1970. Its problem was cash losses from rail operations. Our problem is that while we do make money, we don't believe we can make enough to pay all our valid asbestos-health liabilities, as well as the claims of our other creditors, when due. Mr. Chairman, this situation describes insolvency in the classic *equity* sense. Equity insolvency, that is, the inability to pay debts when due, is a different form of insolvency from balance sheet insolvency, which is having liabilities in excess of asset value. Equity insolvency is now and always has been a valid basis for seeking Chapter 11 protection, although it should be noted that, unlike the former Bankruptcy Act, the present Bankruptcy Code does not require insolvency in order to avail oneself of Chapter 11.

Had we tried to operate outside Chapter 11 after disclosure of the huge contingent liability forecast, our trade credit would have dried up, and our businesses would soon become businesses with operating problems as well as litigation problems. Experienced bankruptcy lawyers all say, Mr. Chairman, that the reason Chapter 11 often doesn't work well enough is because the debtors file too late. They do not file until after they have sold their best assets and they do not file until their operations have deteriorated beyond the point where they can be rehabilitated under the protection of the courts. We were determined not to undermine the integrity of our current businesses only to fight an onslaught of huge liabilities for products which largely were produced for the federal government, and in the absence of the insurance coverage we had purchased over the years. This is precisely the set kind of circumstances, Mr. Chairman, for which Chapter 11 was designed by the Congress.

We do not tread down the Chapter 11 path lightly. As you noted in your August 27 press release, Mr. Chairman, there must be a better way to resolve asbestos-health disputes -- a view which Manville shares. As early as 1975 this Corporation began to work with appropriate federal legislators to construct a more rational, efficient, and exclusive remedy for asbestos health injuries. We continue those attempts today, in the belief that such a system is not inconsistent with our Chapter 11 proceedings and indeed is warranted by the facts in this case. But absent Congressional action that would resolve asbestos disputes for all of the parties concerned, Manville is determined to resolve its own liabilities in a manner that is equitable to all of our creditors.

Chapter 11 will permit us to do just that.

Under the supervision of the Bankruptcy Court and Judge Lifland, and with the concurrence of our creditor committees, we will structure a plan that will allow Manville to satisfy its existing and contingent liabilities so that the underlying vibrant corporation can continue to provide jobs, market products, and pay taxes. Again, Mr. Chairman, Congress possesses the authority to legislate a satisfactory solution to the asbestos-health disability dispute. Many legislative proposals have been advanced, and we would encourage Congress to consider these and other proposed solutions carefully. No matter how fast Manville or the other two asbestos companies in Chapter 11 are able to conclude their filings -- Congress could resolve them faster with appropriate legislation that could be woven into the very fabric of a Chapter 11 proceeding. Importantly, the legislative alternatives pose the substantial opportunity to resolve this national tragedy once and for all, and for all parties, not just the debtor corporations before the courts.

To facilitate resolution of the asbestos related claims in the context of our Chapter 11 case, Mr. Chairman, it is extremely important that no cloud be placed over the capacity and power of the bankruptcy court to deal with the many issues that will necessarily come before it. Toward this end we would commend to this committee the prompt enactment of legislation constituting the bankruptcy courts as Article III Courts with the jurisdiction needed to deal not only with our case, critical as that is to Manville and the thousands affected by it, but with bankruptcy matters nation-wide which have become increasingly complex and involve billions of dollars in assets. Congressional resolution of the crisis created by the Marathon case -- prior to the Supreme Court's December 24, 1982, deadline -- is imperative, for the proposed rule formulated by the Judicial Conference is, in the view of bankruptcy experts, simply not workable.

Mr. Chairman, I would conclude by saying that Manville's extensive experience with the personal injury litigation system as a method of paying disabled workers has been disheartening and overwhelmingly unfavorable. In the context of a massive occupational health disaster such as that posed by the asbestos diseases, mass tort litigation is a terrible way to deliver benefits.

In all of the cases, whether tried or settled, large portions of the amounts we pay are eaten up by large fees for the victims' expert witnesses and their attorneys' contingent legal fees. Similarly, defendants must expend large sums of money with their attorneys for an adequate defense. Too few of the dollars paid ever reach the injured worker.

And the fault-based litigation system produces wildly inconsistent and irrational results. We have participated in trials where severely disabled workers receive no compensation because the defendants were found not to be at fault. We have participated in trials where a victim has lost his case because, as confirmed in post-trial interviews, the jury just didn't like the plaintiff's attorney. And we have participated in trials where six-figure verdicts were rendered against us where the victim evidences no symptoms of injury and no disability whatsoever.

I respectfully submit that such a system should not and need not be tolerated in this country. That this system is largely responsible for three asbestos manufacturing companies filing under Chapter 11 of the Bankruptcy Code is not so much a comment on them -- one of the petitioners had never lost an asbestos trial and another had won nine of the eleven cases it took to trial -- since Chapter 11 was the only available remedy that would permit a resolution of the liabilities. Rather, these events provide compelling testimony to the need for our elected officials, particularly those in the federal legislature, to enact a more rational mechanism for delivering compensation in mass tort tragedies. In the asbestos example, we now have the medical knowledge upon which to base a sound remedial program. Absent a coming-to-grips with this problem -- a need to "secure a proper system for dealing with occupational diseases" as Justice Frankfurter stated when urging legislative action in 1949 -- companies like Manville are compelled to seek a less desirable remedy, but one that is consistent with existing law, accounting standards, and securities regulation, and which treats all of its creditors in an even-handed way.

Mr. Chairman, that concludes my remarks. I shall be happy to answer any questions that you or other members of the Subcommittee may have.

Regulation

Sept/Oct 1982 AEI Journal on Government and Society

Competition of ideas is fundamental to a free society

Publisher, *William J. Baroody, Jr.*
Managing Editor, *Anne Brunsdale*
Board of Editors, *Irving Kristol, John Barnum, Marvin Kosters, Paul MacAvoy, Jack Meyer, Howard Penniman, Austin Ranney,* and *Laurence Silberman*
Associate Editor, *Walter Olson*
Contributing Editors, *Yale Brozen, Bob Katzmann, Marvin Kosters, Edward Kutler,* and *Jeremy Rabkin*
Administrative Assistant, *Christine Binnie*
Editorial Assistant, *Lynn Kryvoruka*
Production Editor, *Donna Spitler*
Designer, *Pat Taylor*
Editorial Consultant, *Hunter C. Harrison, Jr.*
Interns, *Malcolm Gladwell* and *Steven Phillips*

LETTERS 2

PERSPECTIVES on Current Developments 5
Building Access: Cost No Barrier?
Airline Competition and the Slot Market
Regulatory Reform in the States: A View from New York
Dress Codes Decontrolled
In Brief—

MANVILLE: THE BANKRUPTCY OF PRODUCT LIABILITY LAW 14
Richard A. Epstein

RULES WITHOUT [illegible] THE CASE OF THE FTC 20
Timothy J. Muris

HOW TO CONVINCE AN AGENCY: A HANDBOOK FOR POLICY ADVOCATES 27
James V. DeLong

BUREAUCRATS AND THE COST-BENEFIT CHAMELEON 37
Glen D. Nager

READINGS of Particular Interest 47

REGULATION, *September/October 1982, Vol. 6, No. 5. Published bimonthly by the American Enterprise Institute for Public Policy Research. Copyright 1982 American Enterprise Institute. Subscription rates: $18 for one year, $34 for two years (add $12 per year for foreign subscriptions). Single copy price, $3.50. Information on bulk orders or multiple subscriptions available on request. Editorial and business offices: c/o AEI, 1150 17th Street, N.W., Washington, D.C. 20036. Send changes of address and all subscription correspondence to Circulation Department, c/o AEI, same address.*

"American Enterprise Institute" and are registered service marks of the American Enterprise Institute for Public Policy Research.

Second-class postage paid at Washington, D.C.

ISSN 0147-0590

© American Enterprise Institute.
Reproduced with permission.

Manville: The Bankruptcy of Product

Richard A. Epstein

THE ARCANE SUBJECT of bankruptcy has little appeal even to lawyers. In normal times the subject falls into that select group of specialties that must be done, but preferably by someone else. It is therefore a matter of note when a business bankruptcy, to be sure that of a company whose current operations are profitable, is the lead story for several days not only in the *Wall Street Journal* but in ordinary newspapers all across the land. Yet just this has happened now that Manville Corp.—known for years under the name Johns-Manville—has sought refuge in a New York bankruptcy court from an unending onslaught of lawsuits stemming from the use of asbestos.

How Did It Happen?

Manville, long the largest supplier of asbestos, is currently defending itself against about 16,500 asbestos claims, with 500 new ones being brought every month. The company's cost per claim has steadily increased, at a rate far in excess of inflation, to more than $40,000 per claim. The discounted cost of all expected claims present and future is by conservative estimates something over $2 billion. The net worth of the company, the asbestos claims to one side, is just over $1 billion.

The effect of the petition, at least for the moment, is to place the operation of the company's business under the supervision of a bankruptcy judge, and to stay all lawsuits—not just those in asbestos cases—brought against Manville anywhere in the country.* The newspapers have been quick to point up the significance of the maneuver. They have noted that as Manville goes, so may go many of the other major manufacturers of asbestos products who are Manville's codefendants. (It is an open and vital question whether these suits against other suppliers will be stayed as well by the bankruptcy court.) They have also noted that Manville has conducted a well-orchestrated campaign to create some federally organized (and in part federally supported) compensation fund that would, to the consternation of contingent fee lawyers everywhere, replace the huge volume of litigation that now clogs the courts. And there has been a chorus of suggestions for quick fixes of a legal and business problem whose complexity is not fully comprehended by those taken by surprise at the dramatic turn of events. A *New York Times* editorial of August 27, for instance, tells us in five paragraphs "How to End the Asbestos Nightmare."

The Manville bankruptcy petition marks the latest turn in a complex journey. For our

Richard A. Epstein is James Parker Hall professor of law at the University of Chicago.

---

*The matter is complicated by a recent Supreme Court ruling that the 1978 Bankruptcy Reform Act was unconstitutional. The Court gave Congress until October 4 to remedy the defects it found. (One option is to give bankruptcy judges the same life tenure and salary protection as regular district court judges.) If the lawmakers fail to act by then, the effect on this and other bankruptcy cases is anyone's guess.

Liability Law

purposes that journey began on September 10, 1973, when the U.S. Court of Appeals for the Fifth Circuit handed down its opinion in *Borel v. Fibreboard Paper Products Corporation*, allowing asbestos workers to pursue tort actions against the suppliers of asbestos products. In order to understand the current muddle and the limited possibilities for resolving it sensibly, we must go back to *Borel* and to its confused legal and medical antecedents. No short tour will do, for the history is as complex as the current situation.

One of the obvious questions about the current asbestos litigation is, why did nobody see it coming? Surely even the complexities of corporate structure could not have dulled all instincts to take prudent steps to minimize a loss of this magnitude. But clearly the only visible responses by the companies came after the lawsuits were filed, not before, so that Manville and the other asbestos companies could not have had any inkling of the risks they were courting. The question is how that could have been so.

The central element, I believe, with asbestos as with other modern cumulative trauma litigation (DES, Agent Orange, and so on) is the passage of time.

The central element, I believe, with asbestos as with other modern cumulative trauma litigation (DES, Agent Orange, and so on) is the passage of time. It has been conclusively established that there is a period of at least twenty, and often thirty or forty, years between the initial inhalation of asbestos and the manifestation of asbestos-related diseases. The exposures to asbestos that were so frequent in the 1930s and 1940s have therefore become the subject of litigation only in very recent times, when the legal environment and medical understanding are vastly different from what they were back then. It is to the radical shifts in legal doctrine and medical knowledge that we must turn.

Legal Doctrine: Product Liability and Workers' Compensation

The suits brought against Manville are of two sorts. First and most important, there are actions against Manville as the *supplier* of asbestos to other businesses whose employees handled the product, say when installing insulation. Second, there are suits against Manville as the *employer* of individual workers. The first type of action is for a common law tort. The second is for workers' compensation. To a layman, the difference between tort and workers' compensation might appear small, but it is critical to understanding how these two institutions for accident compensation mesh with each other. In the tort action against Manville as supplier, the plaintiff is entitled to recover full damages (pain and suffering, medical expenses, and lost earnings), but only if he prevails by satisfying the complex requirements developed over the years in these tort actions. Roughly speaking, these requirements today include showing that Manville had indeed supplied the asbestos that caused the damage (no easy point when there are many suppliers in the market) and that the product in question was defective (in this context allegedly because Manville failed to conduct the proper tests or to give the proper warning). In addition, the worker's own conduct may also prevent recovery, as (sometimes) when the worker knew about the risk involved, or may diminish the amount of the recovery, as when the worker aggravated the injury by smoking or other misconduct.

In contrast to the tort suit, workers' compensation (here for occupational diseases) with but minor qualification pays the worker once it is shown that the injury or disease in question was work-related. At one stroke it removes the obstacles—proof of product defect or negligence by the employer, and defenses based upon the worker's misconduct—that may block a tort recovery. In exchange for the broader grounds for recovery, workers' compensation offers recipients a lower level of benefits (which, however, today includes everywhere complete medical expenses), and precludes, at least in the classical formulation of the "exclusive remedy" provision, all tort actions that an injured employee might otherwise have against the employer.

The doctrinal differences between the two areas are matched by their institutional differences. Workers' compensation cases are typically decided before commissions, not juries, and contingent fees may be sharply regulated, as in California where the commission sets them at 10 percent of the amount the worker recovers. It has long been a specialized area of legal practice, and one that is terra incognita to the ordinary personal injury lawyer, who feels far more at home with contingent fees that range from a third to half of recovery and with the ordinary jury trial available in both state and federal court. Because the net recovery available within the compensation system is by any measure far lower than that available in tort, plaintiffs have successfully sought in recent years to bypass the compensation system by converting asbestos cases into tort suits. In large part this has been done by expanding the law of product liability against suppliers. In a lesser measure it has come through the very recent expansion of the doctrines of "dual capacity" (whereby it is said that an employer covered by compensation has assumed a separate and distinct role for which it is liable in tort) and "willful misconduct," both of which prevent an employer from availing itself of the "exclusive remedy" provision against its own employees.

In the ordinary course of business we should expect firms dealing with asbestos to take into account their expected liabilities under both the compensation and tort systems in making their decisions about how to produce, use, and price their products—or whether to produce them at all. If the legal environment of the 1970s and 1980s had been foreseen when these asbestos products were sold and used in the 1930s, 1940s, and 1950s, we would have today no bankruptcy problem: large suppliers would be paying for (a reduced number of) claims out of reserves especially accumulated for the purpose.

These claims, however, were unanticipated. To understand why, it is only necessary to look at the type of tort suits brought for various diseases in the 1940s, a pattern that persisted into the 1960s. Here I have been able to discover three cases that bear some relationship to the general problem. Of these only one—*Rowe* v. *Gatke Corp.*, decided by the Court of Appeals for the Seventh Circuit in 1942—involves asbestos as such. The defendant in *Rowe* was not a product supplier, but an employer who had elected, as was then possible, to opt out of the compensation system by subjecting itself to stringent forms of tort liability. The action, moreover, was successful because in it the plaintiff was able to show that the defendant had not adequately ventilated its plant, having used only "crude devices" for that purpose even though "standardized equipment" was available, and had not supplied the plaintiff with any kind of working respirator—all in violation of the applicable factory safety statutes. As a result of these practices, the dust was so thick that the plaintiff "at the end of a day's work appeared almost beyond recognition, covered with shreds that hung on him like whiskers, so that he looked like a 'polar bear.' " The decision in favor of the plaintiff is unquestionably sound. But for our purposes the relevant observation is that the case does not even begin to point to any tort liability for an asbestos supplier. The statutory provisions involved applied only to employers, and the inadequate provision of ventilation and absence of respirators were by definition the types of errors that no supplier could commit. In addition, the flagrant nature of the employer's misconduct only afforded an additional defense—that of the intervening misconduct of a third party—that further would have insulated the supplier from any tort suit.

The other two cases tell a similar story. Both involved deaths from overexposure to carbon tetrachloride ("carbon tet"), then used as a cleaning solvent. In the first, *McClaren* v. *G. S. Robins & Co.* (1942), the Missouri Supreme Court denied a worker's claim against the seller (who it appears was not a manufacturer) for injuries that took place when he was working with the solvent in a confined location at a temperature apparently as high as 110 degrees. The court noted that some of the carbon tet supplied was labeled "Volatile Solvent, Use with Adequate Ventilation, Avoid Prolonged Breathing"—a warning that was customary in the industry and approved by the surgeon general of the United States, presumably pursuant to his statutory powers. The decision could be challenged on the ground that the court treated the standard of care for the warning as being set conclusively by average practice, a rule that had in fact been rejected in many cases before then. But the decision itself rested in part on compliance with the surgeon general's warning requirements, and in any event it came out for the defendant. Even if it had come out the other way, it still would not have augured ill for the asbestos manufacturers because of the known and close relationship between carbon tet and inhalation poisoning.

This leaves only the second case also involving carbon tet, *Maize* v. *Atlantic Refining* (1945). Here the Pennsylvania Supreme Court held the defendant liable for the death of a housewife who inhaled the fumes from its product, "Atlantic Safety-Kleen," while cleaning her rugs. The product itself contained amounts of carbon tet which, when vaporized in normal use, were several thousand times the concentrations known to be sufficient to cause death. Though the label in question did warn about the dangers of use without adequate ventilation, the court rightly allowed recovery on the ground that "the word 'Safety' was so prominently featured as to exclude from her mind that 'provident fear' which has been characterized as 'the mother of safety.' " Yet here too there were no apparent risks for asbestos suppliers. The court relied in part on the defendant's affirmative misrepresentation of a known safety hazard. And since the death arose in the consumer and not the work-place context, the court did not confront the issue of intervening control by a responsible employer covered by the compensation laws and capable of preventing injuries. It is not surprising therefore that the court in *Borel* did not rely on these cases as signposts on the general road toward supplier liability in asbestos cases, for if anything their specific features point in quite the opposite direction.

Indeed it is quickly apparent that the medical and public health discussions of asbestos that took place before the *Borel* decision follow the same general pattern. Asbestosis was regarded preeminently as an occupational disease, and it was thought that the control of the level of exposure within the work place, often by direct regulation, was the proper approach to the problem. This attitude finds expression in the studies of asbestosis by Dr. A. J. Lanza in the 1930s, and it is essentially followed by Dr. Irving J. Selikoff who, in his 1968 testimony to Congress on the pending occupational safety and health administration bill, at no point even contemplated tort actions against third party suppliers.

In short, at the time that Manville and other corporations sold asbestos, right up to the 1960s, they were subject to no discernible risk of tort liability either as supplier or employer.

The same holds true of the second (but less important) prong in the expansion of tort liability, for the dual capacity and willful misconduct doctrines were not used in connection with asbestos diseases until the late 1970s. In short, at the time that Manville and other corporations sold asbestos, right up to the 1960s, they were subject to no discernible risk of tort liability either as supplier or employer. And the liabilities faced by Manville and other suppliers to their own workers under the occupational disease statutes were well understood, and in no event could they have driven the company to bankruptcy. On the legal front all was quiet.

Medical Issues

An evaluation of the relevant medical evidence is somewhat more difficult. As of now asbestos has been conclusively linked with three separate disorders: asbestosis, mesothelioma (an invariably fatal condition that affects the mesothelial cells that line the chest cavity), and lung cancer. The relationship between asbestos and asbestosis was the first to be clarified: it was regarded as probable shortly after 1900, and was established by the 1930s. The relationship between asbestos and lung cancer was not determined until a later time, being regarded as probable only after 1940 and established only (depending on whose view is accepted) somewhere between 1955 and 1960. Mesothelioma was the most difficult condition to establish. In the early years, it may have been confused with asbestosis, and in any event the connection between it and asbestos was first regarded as probable only in the late 1950s and established in the mid-1960s. (Margaret R. Becklake's 1976 article on this subject provides a comprehensive account; for this and other citations, see page 46 below.)

If the only question relevant to the legal inquiry was the association between asbestos and disease—any disease—then the affirmative connection was clearly recognized by the time of the 1938 Dreessen study on the asbestos textile industry and the 1946 Fleischer-Drinker study of insulation workers in naval vessels during World War II. Yet the apparent simplicity of this conclusion should not be allowed to conceal the essential point that the early studies thought that the permissible levels of exposure to asbestos products were far greater than those which are today generally regarded to be safe, by a factor of perhaps 50 to 100.*

Indeed, some of the early studies contain a kind of grisly, misplaced optimism that seems almost bizarre today. In 1936 Lanza wrote that in both England and America "energetic steps have been taken to control the dust hazard in asbestos plants, so that it is probable that further cases of disabling asbestosis will be rare," and further that "asbestos plants are being cleaned up and the dust is being controlled." This, he added, "together with the smaller number of persons employed, implies that there will probably never be the wealth of clinical material that has been available in silicosis." Nor was this conclusion an isolated and irresponsible piece of optimism. The 117-page Dreessen study concludes as follows:

In 1936 Lanza wrote that in both England and America "energetic steps have been taken to control the dust hazard in asbestos plants, so that it is probable that further cases of disabling asbestosis will be rare"....

> It would seem that if the dust concentration in asbestos factories could be kept below 5 million particles (per cubic foot) (the engineering section of this report has shown how this may be accomplished), new cases of asbestosis probably would not appear.

Likewise the overall conclusion of the 1946 Fleischer-Drinker study was that "[s]ince each of the 3 cases of asbestosis had worked at asbestos pipe covering in shipyards for more than 20 years, it may be concluded that such pipe covering is not a dangerous occupation."

That such represented the prevailing scientific wisdom of the time is, moreover, reinforced by looking again at the subsequent classical work on the relationship of asbestos to disease by Dr. I. J. Selikoff and his colleagues. In three studies published in 1964–65, they repeatedly stated that proper analysis of the problem requires a breakdown of asbestos workers by particular types and that any inferences to be drawn from textile workers, the chief object of the early studies, to other types of workers must be heavily guarded. As Selikoff explained in a paper on insulation workers, "The different occupations vary widely in important respects; intimacy, intensity and duration of exposure, in variety and grade of asbestos used, in working conditions, in concomitant exposure to other dust or inhalants." This same paper criticized the 1945 Fleischer-Drinker study because 95 percent of the workers studied there "had worked for less than 10 years at the trade and, as we shall see, evaluation of the risk of insulation workers limited to study of men with relatively short duration of exposure may be misleading." Selikoff frequently noted the statistical and technical objections to the earlier studies that sought to link asbestos with disease conditions (made, as he reported to Congress in 1968, by those "sticklers for statistical niceties"). Indeed his own detailed studies of insulation workers in the New York area were designed to overcome the doubts about the previous research and to establish rigorously, for the first time, the relationship between asbestos and the various asbestos diseases in insulation, as opposed to textile workers. Yet even his studies did not, as he acknowledged, determine the dosage levels necessary to trigger these diseases (in particular there was at most only a vague inkling that a "single sniff" of asbestos could be sufficient to cause mesothelioma) or establish the correct relationship between asbestos diseases and the smoking habits of individual workers. Today, however, the evidence on this subject is so overwhelming that the causal questions can no longer be seriously debated: the older studies vastly underestimated risk and overestimated dosage levels.

---

*Direct comparisons are somewhat difficult to make because the earlier standards referred to particles of dust while the more recent ones refer to particles of asbestos. The 100 figure assumes that virtually all the particles are asbestos; the 50 figure assumes that about half are.

The Borel Opinion

In light of modern knowledge, the older patterns of asbestos use are therefore quite indefensible, and are recognized as such by all parties. For purposes of legal liability, after all, it is not the current state of knowledge that is relevant, but the state of knowledge in the early years when the asbestos products were placed on the market. Yet in the *Borel* decision, Judge John Minor Wisdom, speaking for the court, concluded that the various asbestos companies all had sufficient knowledge of the hazards of asbestos products to trigger a duty to test their products before sale and to warn possible users of their harmful side effects upon sale. His conclusion does not do justice to the historical ambiguities and uncertainties. It is here that the legal and the medical currents join in unexpected, and unfortunate, ways.

Let us begin with the medical question. When the companies asked for a rehearing of the earlier decision, Judge Wisdom was quite insistent that the case against them was ironclad:

> The unpalatable facts are that in the twenties and thirties the hazards of working with asbestos were recognized; that the United States Public Health Service documented the significant risk in asbestos textile factories in 1938; that the Fleischer-Drinker report was published in 1945; that in 1961 [sic] Dr. Selikoff and his colleagues confirmed the deadly relationship between insulation work and asbestosis.

This summary goes far beyond anything in the evidence. It ignores the fact that the 1938 and 1945 studies both concluded there were exposure levels that presented no health hazards. And nowhere does it make clear that, as Selikoff himself pointed out, it is difficult to generalize the findings from one type of asbestos case (say, textile workers) to another (say, insulation workers). The judge did not even take note of, let alone discuss or analyze, any passages such as those quoted above. And when in other portions of the opinion Wisdom did comment on the soundness of the earlier work, he was quite happy to condemn the 1945 studies on the basis of Selikoff's criticisms published some twenty years later—as if it were expected for manufacturers to be twenty years ahead of established medical knowledge. Nor does his opinion disclose any evidence that the suppliers possessed any private knowledge that they

The kindest thing that can be said about the summary of the medical evidence in Borel is that it is one-sided and incomplete, written far more like an over-argued brief than a judicial opinion.

(Continues on page 43)

Manville and Product Liability

(Continued from page 19)

withheld from the public at large. The kindest thing that can be said about the summary of the medical evidence in *Borel* is that it is one-sided and incomplete, written far more like an over-argued brief than a judicial opinion.

Legal doctrine, like the medical evidence, had changed greatly in twenty-plus years. It is instructive that Wisdom in no way attempted to invoke any of the doctrines that prevailed when the asbestos products were marketed a generation ago. Instead he relied heavily upon the *Restatement (Second) of Torts* first published in 1965, and an unfortunate decision handed down in 1968 by the ninth circuit court on a drug company's liability for polio vaccine. The principle he extracted was that where products are both dangerous and useful the supplier is under a duty to warn about their hazardous side effects, because "the user or consumer is entitled to make his own choice as to whether the product's utility or benefits justify exposing himself to the risk of harm"—itself an odd point in the work-place context for a judge who regards individual autonomy as something of a fiction in employment relations. In any event, Wisdom delineated what he saw as the scope of the manufacturer's liability.

> [I]n cases such as the instant cases, the manufacturer is held to the knowledge and skill of an expert. This is relevant in determining (1) whether the manufacturer knew or should have known the danger, and (2) whether the manufacturer was negligent in failing to communicate this superior knowledge to the user or consumer of its product. The manufacturer's status as expert means that at a minimum he must keep abreast of scientific knowledge, discoveries, and advances and is presumed to know what is imparted thereby. But even more importantly, a manufacturer has a duty to test and inspect his product. The extent of research and experiment must be commensurate with the dangers involved. A product must not be made available to the public without disclosure of those dangers that the application of reasonable foresight would reveal. Nor may a manufacturer rely unquestioningly on others to sound the hue and cry concerning a danger to its product. Rather each manufacturer must bear the burden of showing that its own conduct was proportionate to the scope of its duty.

This decision completely transformed the law. Before the case, the sum and substance of the manufacturer's duty was to make sure that its purchasers knew what its product was and perhaps to warn of any latent dangers of which it had knowledge but the user and consumer did not. Asbestos satisfied the first element, since it was properly labeled for sale, so that purchasers and users could tell at a glance what it was. On the second element, however, all the relevant information was in the *public* domain. The most that could be said against the manufacturers is that they did not want to undertake studies about the possible side effects of asbestos use. Yet one must question the soundness of a system that places on each manufacturer the duty to test and inspect its asbestos. The question here is what party or institution is in the best position to test for the possible side effects. That question cannot be answered in a single uniform way for all products at all times. Here the key point is that asbestos is a product found in nature and used since ancient times, and one that is mined and supplied by a large number of separate companies. Many chemicals and drugs, by contrast, are developed under patent or license by a single producer who is therefore in a position particularly suited to test for its dangers.

Moreover, as noted above, the critical question of the actual level of worker exposure is most often controlled by the employer's company, and not the manufacturer. All the epidemiological studies, whether done by industry, the government, or independent physicians, have sought to measure asbestos exposure in the work place; all the government efforts to regulate exposure levels have sought to regulate it there. The *Borel* decision, therefore, not only demands that manufacturers conduct tests on the side effects of a generic product in common use, but it transfers the inquiry from those who could best do it to those who can do it only with difficulty. To say, moreover, that one manufacturer cannot rely upon the studies done by others is to invite mindless duplication of studies. Surely it is better to have the work done by independent parties whose findings and motives are more difficult to call into question than those of an interested party.

To impose such a duty on the manufacturer is bad enough; to announce that duty after the fact is to compound the dislocation. The *retroactive* nature of the duty not only renders the judicial exercise pointless as a matter of deterrence, but also imposes on the firm the impossible task of complying with a liability rule of which it could not have had any knowledge. The standard practices of yesterday have become the source of liability today. Rules, like horses, should not be changed in midstream. Therein lies the source of the Manville bankruptcy petition.

The retroactive nature of the duty not only renders the judicial exercise pointless as a matter of deterrence, but also imposes on the firm the impossible task of complying with a liability rule of which it could not have had any knowledge.

The extent of this shift should not be understated. Asbestos suppliers, prompted by the first Selikoff study, began to use new warnings in 1964, only to have Judge Wisdom brush this effort aside in *Borel* as inadequate for the task at hand. In his view the warnings did not call explicit attention to the "fatal" nature of the illnesses involved, while the "admonition that a worker should 'avoid breathing the dust' is black humor." (Again the observation comes from the same federal judge who thought that worker autonomy required the warnings.) If so, then what are we to make of the warnings now required by the Occupational Safety and Health Administration: "Caution — Contains Asbestos Fibers—Avoid Creating Dust—Breathing Asbestos Dust May Cause Serious Bodily Harm." And how do we respond to those who say that warnings here would have had no greater effect than they have had in the case of cigarettes?

The Wrong Forum

We are now in a position to see just what went wrong in the asbestos situation. It was the midstream change of forum for the resolution of these disputes from workers' compensation to the tort system. To make the point explicit, consider what would have happened if the cases had remained solely within the compensation system. The manufacturers, including Manville, would have been required to compensate their own workers for their injuries. Resolving the issues still would have posed difficulties, as there would have remained the question of whether a particular injury was asbestos-related and whether it was aggravated by some preexisting condition or by smoking. There would also have been the question of *which* employer was to compensate those workers who had frequently shifted jobs during their working lives, a burden that is reducible to manageable proportions by the rule that says that the last employer to expose the worker to asbestos dust picks up the full loss. To be sure, the level of compensation would be lower than it is today, but workers' compensation awards are not trivial and would in any event be bolstered by the workers' own insurance policies. Exposure levels can still be handled by direct regulation (as is now the case) or perhaps even by agreement between workers and employers, especially in the framework of collective bargaining.

Now that the battle has moved to the product liability arena, everything has been transformed. Retroactive application of new rules is just one of the problems. There is also a myriad of issues—defect, negligence, assumption of risk, and so forth—that must be litigated in order to determine relative responsibility. As Manville noted in the open advertisement it published on its announcement of bankruptcy, the tort system is "haphazard" in that different juries hearing the same evidence returned verdicts that ranged from a complete exoneration of Manville to an award of punitive damages against it. The company could have added that all these verdicts are probably consistent with the available evidence. The major source of dif-

. . . the tort system is "haphazard" in that different juries hearing the same evidence returned verdicts that ranged from a complete exoneration of Manville to an award of punitive damages against it.

ficulty is that the modern doctrines of product liability law are so loosely formulated (chiefly consisting of a long list of relevant factors with indeterminate "weights") that once any defendant can be proved to have had any knowledge of any possible risk, any verdict, including one for punitive damages, becomes possible—and nonreversible on appeal.

The product liability situation suffers from additional complications not found in workers' compensation that arise from the sheer problem of large numbers. In order to be both safe and sensible the prudent plaintiff will sue every manufacturer that ever supplied any employer for whom he worked over the years. In the typical case this could well mean suing between ten and twenty defendants, each of which is, on the question of liability, in a somewhat different position from the others. To make matters worse, each of these defendants will demand that each of their many insurers take on the defense of the suit in question.

But the law today on the obligations of insurers to their insureds and to each other in these cumulative trauma cases can only be described as chaotic. Thus the standard coverage provisions (which require the insurer to pay "all sums which the insured shall become legally obligated to pay as damages because of bodily injury, disease, or sickness caused by an accident, including a continuous or repeated exposure to conditions which results during the policy period in bodily injury") have been construed in three wholly inconsistent ways by the three federal circuit courts that have now passed on the question. The upshot is that in many cases all the insurers for all the manufacturers may have some portion of the defense and indemnity obligation in each individual case. The resulting confusion and expense is almost impossible to imagine. It is tempting to attack the whole group of insurers and manufacturers for having left the terms of coverage incomplete, and thus having invited the entire problem. But again the truth is that, at the time these policies were taken out, no one anywhere thought that the question of tort liability for cumulative trauma was important enough to warrant the needed clarifications. We can regret that judgment today, but in the 1940s product liability was regarded as such a minor source of risk that it was not even separately priced, and was indeed often given away without charge as an inducement to obtain more lucrative business. Again the insurance coverage problem, which only promises to get worse as excess carriers are drawn into the picture, shows some of the hidden costs of shifting the control of occupational diseases from the compensation system to the tort system.

Is there, at this late date, any way to take the problem out of the tort system? One suggestion that has been frequently made of late is to establish some kind of comprehensive program, modeled loosely on the black lung disease fund, to which all asbestos victims would be required to apply for compensation. The theory is that a centralized disposition of the cash would help eliminate many of the administrative and insurance nightmares that result from the proliferation of defendants in the tort setting. The proposal is of course strongly opposed by the plaintiffs' lawyers, whose contingent fees would be reduced, if not eliminated, by the plan.

Yet even on principled grounds there are formidable difficulties involved. First, there is the thorny question of how much money should be set aside in the fund, and how it should be raised. This question is of great difficulty, given that many of the claims have not yet matured and their number cannot be precisely estimated. One-time assessments would be almost impossible to calculate, but a continuing right to demand fresh assessments from the manufacturers would perpetuate their financial uncertainty and dim their enthusiasm for the plan. Second, if, as I have suggested, the manufacturers' tort liability is not as clear as has been generally assumed, then should the amount demanded from each firm be reduced to reflect the weakness of the claims against it? On the other hand, certain courts have allowed suits for punitive damages. Should the fund have to pay even if they affect only some manufacturers but not others? And what happens to the insurers? The conclusion seems well nigh irresistible that the insurers' obligations are transferred from the individual plaintiffs to the fund. But no one knows what those obligations are in the first place, because no one knows the extent of insurer obligations for the original tort actions. Finally, to add yet another note of uncertainty to the entire situation, there is the lingering question of whether the government should contribute in view of its heavy use of asbestos in naval shipyards during the Second World War. All in all, such a comprehensive fund may well be said to be both a necessity and an impossibility—which testifies once again to the difficulties that emerge when judges radically change a system of compensation in midstream.

. . . a comprehensive fund may well be said to be both a necessity and an impossibility —which testifies once again to the difficulties that emerge when judges radically change a system of compensation in midstream.

Is there some other way that promises to be both more modest and more successful? Here I think that we should look once more at the workers' compensation system. The basic advantages of dealing with occupational diseases within this framework have already been noted. What is striking about the current situation is that many claimants have not even tried to collect the compensation benefits to which they are entitled by law. Why they have not is not at all clear, but some reasons can be advanced. First, sharp limitations on contingent fees may be dulling the incentive for suit. Second, plaintiffs often fear that the results of the medical examinations in compensation proceedings may be used against them in the tort action. Third, tort lawyers simply do not know and do not like the compensation system.

One radical way to return to the compensation system is to bar all tort actions against suppliers. While this might seem radical within the American system, it represents the uniform practice in every other industrial country. The likelihood that anyone will adopt this approach in this country is slim for political and perhaps even constitutional reasons. A larger role for the compensation system might be achieved, however, if legislators used a judicious combination of the carrot and the stick. The carrot might consist of relaxing both the restrictions on contingent fees and the eligibility rules of recovery in occupational disease cases. The stick might consist of a simple rule saying that the plaintiff's tort recovery is reduced by the amount of the compensation benefits paid *or payable*, so that injured workers have a reason to turn to the compensation system first. For small cases this rule would forestall the lawsuit entirely. For large cases, it would mean that the stakes would be reduced and, with that, the costs of litigation for both parties. To be sure, the compensation system would come under new pressures that it has thus far escaped, but they would be only the pressures that have long been understood as appropriate for it, if not in all states then in the vast majority that allow recovery for occupational diseases. Mistakes could still be made, but the possibility for grave dislocations would be reduced.

The amount of work that would have to be done to make this proposal work in fifty-one jurisdictions (including the District of Columbia), with federal and state overlaps, is formidable beyond belief. And the prospects for success are at best modest. But the Manville bankruptcy has shown that even today there is not an endless supply of water at the trough. We must somehow undo the confusion wrought by unsystematic and unthinking judicial activism. Otherwise—as more and more cases work their way through the legal system, and more and more firms take the bankruptcy route—the only doors left will be closed, and marked "No Exit." ■

Selected References

Margaret R. Becklake, "Asbestos-Related Disease of the Lung and Other Organs: Their Epidemiology and Implications for Clinical Practice," *American Review of Respiratory Disease*, vol. 114 (1976).

W. Dreessen et al., "A Study of Asbestosis in the Asbestos Textile Industry," Public Health Bulletin No. 241, U.S. Treasury Department, 1938.

W. Fleischer et al., "A Health Survey of Pipe Covering Operations in Constructing Naval Vessels," *Journal of Industrial Hygiene and Toxicology*, vol. 28 (January 1946).

A. J. Lanza, "Asbestosis," *Journal of the American Medical Association*, February 1, 1936.

Irving J. Selikoff, Testimony before a subcommittee of the Committee on Education and Labor, House of Representatives, March 7, 1968.

Irving J. Selikoff et al., "Asbestos Exposure and Neoplasia," *Journal of the American Medical Association*, vol. 188 (April 6, 1964); idem, "Relation between Exposure to Asbestos and Mesothelioma," *New England Journal of Medicine*, vol. 272 (March 18, 1965); and idem, "The Occurrence of Asbestosis among Insulation Workers in the United States," *Annals of the New York Academy of Sciences*, vol. 132 (December 31, 1965).

[From the Wall Street Journal, Nov. 4, 1982]

WINNERS AND LOSERS IN THE MANVILLE BANKRUPTCY

(By Jeremy Bulow, Thomas Jackson, and Robert Mnookin)

Manville Corp. startled the financial community last August by seeking refuge under Chapter 11 of the Bankruptcy Code. Manville wasn't a typical bankruptcy debtor. The company had a healthy cash position, a book net worth of $1.1 billion and a positive cash flow from current operations. The problem was tort claims—not simply the 16,500 existing claims by victims of asbestos diseases, but rather, as Manville disclosed with its filing, the 30,000 to 120,000 persons who over the next 20 years would discover that they also had asbestos-related diseases traceable to past Manville operations. Manville estimated at the time it filed that the present cost of satisfying all claims would be in excess of $2 billion, including its litigation expenses, leaving the company with a negative net worth.

The reaction to the Manville action was immediate, loud and angry because of concern for the asbestos victims. Lawyers representing asbestos victims called it a "fraud" and a "perversion" of the bankruptcy laws. These tort lawyers and their existing clients do indeed stand to lose, but the suggestion that Manville's action is hurting the class of asbestos victims, present and future, is probably false.

To get beyond the rhetoric, one must compare the consequences to various groups both with and without a Manville bankruptcy.

If Manville's numbers are correct, the unavoidable reality is that there are not enough assets to go around, whether Manville continues as a going concern or folds up shop, in or out of bankruptcy. Though current operations appear profitable, they cannot support the liabilities of Manville's past. Like a thrice-divorced executive earning $100,000 a year, the problem is not the absence of current income, but the scale of obligations arising from past relationships. The question, then, is not how to pay everyone off in full, but rather how to minimize and fairly allocate the certain losses.

COURSE COULDN'T LAST FOREVER

Manville might have continued on a business-as-usual path, as it did until Aug. 26, but this course couldn't last forever. As claims were recognized and paid, Manville would inevitably shrink and its financial position would weaken. At some point, claimants such as trade creditors and lenders would demand to be paid before Manville exhausted its assets. The fact that Manville's assets might be worth more as a going concern wouldn't matter. If that were the case, those assets could be sold off as an operating business.

This course of action is being pursued by Forty-Eight Insulations Inc., which has effectively sold off its operating assets for cash and is paying asbestos victims as their claims are established until, one day, there is no more cash. But however Manville decided to dispose of its assets, those who got in line early would be paid in full; when Manville ran out of assets, the rest—particularly asbestos victims who had not yet realized they had a disease—would get nothing.

How does bankruptcy change the picture? Bankruptcy "collectivizes" the procedure by which people get paid. Instead of first-come, first-served, bankruptcy theoretically provides first, that each "senior" creditor class is entitled to be paid in full before a "junior" class gets anything, and second, that all people in the same class are paid the same portion of their validated claims.

Under Chapter 7, the chapter of the Bankruptcy Code dealing with "liquidations," a company could duplicate the course described above, involving the conversion of assets to cash, either by selling assets off one by one, operating division by operating division, or as a single ongoing business. Claimants would be paid off with that cash strictly in the order of their entitlements.

The difference between Chapters 7 and 11 is not necessarily whether the business continues, but rather, who owns it. Under Chapter 11, which deals with "reorganizations," a company continues in business by selling its profitable operating assets to its existing claimants, thereby discharging the company's old liabilities. Claimants are often paid not with cash but with securities of the reorganized entity. Determining what these securities are and whether they adequately compensate the class typically requires extensive negotiations among the various classes, which Chapter 11 attempts to channel by a series of rules and guidelines.

The preceding framework permits an intelligent assessment of how competing claimants will be affected by Manville's action

The biggest winners and losers will both come out of the same class—the asbestos victims. Because bankruptcy eschews a first-come, first-serviced payment system, the existing claimants stand to lose; the future claimants stand to gain.

There are, to be sure, other probable winners and losers. Manville's other unsecured creditors are almost certainly losers as a result of Manville's Chapter 11 filing. For each dollar they are owed, they are likely to collect only some fraction. Outside of bankruptcy, most would have been able to assert their rights and be paid in full before Manville ran out of money. They would have been in line far ahead of the people who didn't yet know that their past asbestos exposure would result in disease.

Manville's creditors, such as bondholders and banks, who have security interests in particular assets, are probably losers, but to a smaller extent than to the unsecured creditors. In the bargaining over how the pie is divided in a reorganization proceeding, creditors' legal rights notwithstanding, the history of bankruptcy teaches that secured creditors probably will receive less than the monetary equivalent of their claims.

Finally, unless Manville could have avoided disclosing its contingent tort liability and continued to pay dividends for a while, common stockholders, on the company's own numbers, were almost certain to get nothing outside of bankruptcy, since Manville would be required to satisfy all of its asbestos obligations first. These stockholders may benefit from the Chapter II bargaining process, which gives them some agenda-setting strategic advantages. Managers and employees of Manville may benefit if the bankruptcy proceeding somehow helps keep the operating assets of Manville intact.

How about the lawyers? There will be both big winners and big losers.

On the one hand, that small group of bankruptcy specialists involved in all major corporate reorganizations will profit enormously. No doubt the bankruptcy proceeding itself will generate millions of dollars in legal fees to the lawyers representing the various participants.

On the other hand, the tort lawyers defending Manville and the contingent fee lawyers representing asbestos victims, are, perhaps more than any other group, clear losers. Manville will no longer need as large an army of tort defense lawyers. The plaintiffs' lawyers had expected to receive approximately one-third of their clients' full recovery. In bankruptcy, however, because their existing clients will receive less, these lawyers' fees will inevitably be reduced. These specialists, moreover, will receive nothing from what the remaining—future—asbestos claimants recover in Manville's bankruptcy. It is these claimants who would have served as this group's next pool of clients, generating additional fees until the money ran out.

THE HUMAN TRAGEDY

Not surprisingly, the victims' lawyers have complained bitterly about the Manville bankruptcy. Bankruptcy radically affects the allocation of assets among asbestos claimants, to the clear detriment of these lawyers and, to some extent, their existing clients. But future claimants will be benefited, and bankruptcy probably will not reduce the total assets available to all its victims.

Indeed, there are two reasons why bankruptcy may make more available to the asbestos claimants. First, as noted, bankruptcy may shift part of the inevitable losses to other classes of creditors who might otherwise have been paid off in fill. Second, while the costs of a bankruptcy procedure are substantial, in this instance they may be dwarfed by the savings resulting from collectivizing 50,000 asbestos claims. More of what Manville pays out will go to victims, not their lawyers. And the millions that Manville can save from not having to defend the lawsuits on an individual basis will increase the pool available for distribution, to the benefit of all.

The human tragedy is that there are so many victims of asbestos-related diseases. Unfortunately, there are not enough assets available in Manville to compensate all victims fully. Moreover, the bankruptcy filing doesn't change that unpleasant fact. Indeed, bankruptcy may increase the pool of assets available to victims. The clear effect of bankruptcy will be to allocate this pool more evenly among asbestos victims. While currently identified victims may lose in the process, the as-yet-unidentified victims, and perhaps the class as a whole will gain.

Senator **Dole**. We will now have a panel of Mr. Robert Steinberg, Mr. Robert Rosenberg, and Ms. Judy Gentile, and their counsel, Mr. John Sears.

STATEMENTS OF ROBERT STEINBERG, COUNSEL; THOMAS HENDERSON, TRUSTEE; AND JOHN SEARS, COUNSEL, ASBESTOS LITIGATION GROUP; ROBERT ROSENBERG, PROFESSOR, NEW YORK UNIVERSITY LAW SCHOOL; JUDY GENTILE AND JEAN MANTI

Mr. STEINBERG. Mr. Chairman, I am Robert Steinberg from Los Angeles. I am here as an attorney representing some of the victims of asbestos disease, and also representing the Asbestos Litigation Group, which is an association of lawyers representing plaintiffs in asbestos litigation, and they represent, I think, a good 90 percent of the more than 15,000 claims that have been filed in court against the asbestos manufacturers, Manville being the principal one.

With me, if I may, Mr. Chairman, to my extreme right is Ms. Judy Gentile and her mother, Ms. Jean Manti. Judy is the daughter and Jean is the surviving wife of Mr. John Manti, who was an insulator for a number of years and recently died from asbestos-related lung cancer.

To my right is Mr. Tom Henderson of the Pittsburgh bar, who is a trustee of the Asbestos Litigation Group and has been involved in asbestos litigation on the plaintiff's side for the last 8 or 9 years.

To my immediate left is John Sears, the counsel to the Asbestos Litigation Group, and behind him is Robert Rosenberg, of the New York bar, a specialist in bankruptcy and professor in the subject at the New York University Law School, who has kindly consented to come down here and be of whatever assistance he can to us on the issues which are facing this committee.

Senator DOLE. Mr. Rosenberg, would you like to pull up a chair there?

Mr. STEINBERG. Mr. Chairman, we did submit some written remarks which are incorporated in the record. I do not intend to read those; I only intend to express some thoughts that might be of some assistance to the committee and to indicate that we share the committee's feeling expressed by the Chair a few moments ago.

IMPROPER USE OF BANKRUPTCY COURT

It is more a sense of outrage on our part at this attempted use of the bankruptcy court for the purpose of permitting the company to rid itself of the asbestos litigation claims.

As the Chair pointed out in his remarks, this is a company that is financially sound and extremely healthy. It turned a profit for I guess as long as 50 years of its existence, or longer. I think, as the Chair pointed out, its assets were in excess of $2 billion. It is an extremely viable and going concern.

It seems that the principal reason for the filing certainly is the effort to permit the company to rid itself of the asbestos claims, and we feel that, certainly, this is not an appropriate use of the bankruptcy courts. We do not believe that Congress conceived that the bankruptcy courts could be used for such a purpose when it enacted the 1978 reforms.

Certainly, the bankruptcy courts have other challenging and difficult issues to deal with and should not be a repository for thousands and thousands of personal injury claims and the necessity to litigate those.

THE CIVIL JUSTICE SYSTEM

Now, we have heard from the Manville representatives a moment ago about the civil justice system not being an appropriate way to go about doing business in this field. We submit, Mr. Chairman, that Manville just never gave it a chance. They have spent an awful lot of money defending these claims, and this has been going on for longer than I think most of us have been alive. Our counterparts started this thing 50 years ago.

In various forms or other, the effort on the part of Manville has been to delay and deny and refuse payment until they got to the point where they just had to do it and until they got to the point where they were stuck with judgments.

Now, early in the game they won a few cases, and they spent a lot of money doing it. And when it was going that way, they did not seem to mind that civil justice forum at all. They never really came forward to use it as a forum in which to resolve disputes, but just to deny the claims and to contest each one. After they were hit with a few punitive judgments, they now seem to find that it is an inappropriate forum.

I submit that the mechanisms existent in the civil justice system have begun to be used in this litigation. There are many things that can be done short of having to file the Chapter 11 and take the extreme step that Manville has under these circumstances.

MANVILLE'S ACTION AS PRECEDENT

We feel strongly that the Congress should act in this field if one concludes, as we have, that chapter 11 filing merely to permit a company to rid itself of these claims is inappropriate. If we conclude that, then certainly Congress should act because, as the Chair pointed out in his remarks, there will be a tendency for many, many companies to follow suit, even companies that under ordinary circumstances would not think of filing chapter 11 claims but might think of doing it under these circumstances because it is an advantageous thing to do.

We had the recent filing by the Farm Bureau Federation of the State of Michigan, which I think was referred to in the Chair's remarks. There, the petition that was filed by the Farm Bureau clearly indicated that the purpose of the filing was to eliminate existing PBB liabilities once and for all.

Now, we view this, Mr. Chairman, as just the most recent act in a long series of efforts on the part of the Manville Corp. to evade and avoid and deny its responsibility for this occupational tragedy.

I think a little bit of history in this area will be instructive. Tom Henderson, as I previously indicated, has been in this litigation for 8 or 9 years and is one of the attorneys primarily responsible for discovering a lot of the materials involved in the litigation as to Manville's past conduct. I think he is an appropriate person to cover that subject and I, with the Chair's permission, would like to turn it over to Tom.

Senator DOLE. Tom?

Mr. HENDERSON. Mr. Chairman, thank you. As a prelude, our position is very simply——

Senator DOLE. Would you just identify yourself for the record?

Mr. HENDERSON. Yes. I am Thomas W. Henderson from Pittsburgh, Pa.

As a prelude, Mr. Chairman, our position is very simply that Manville should not be permitted to avail itself of the extraordinary relief provided under chapter 11 for what ought to be a haven for legitimate bankruptcy.

HISTORY OF MANVILLE'S ACTIONS

We view the filing on August 26, 1982, by Manville as a culmination of 50 years or more in which Manville has essentially devoted itself to a coverup of the existence, and indeed the suppression, of the disease and death caused by asbestos exposure and, later on, to deny just compensation on an individual basis to the victims to whom exposure resulted in disease.

Some of the specifics of the coverup to which I would like to allude to at this point, Mr. Chairman, are directly contrary to the assertions made by Mr. Parker.

For example, very clearly, a letter dated October 1, 1935, from the president of Raybestos-Manhattan, now Raymark, whose testimony will be heard later on this morning, I understand, directed to Mr. Vandiver Brown, an attorney for Johns-Manville, said, among other things, "I think the less said about asbestos, the better off we are."

Two days later, at a time when apparently they responded more quickly in the mails, Mr. Brown sent to Mr. Simpson, under the very letterhead of the corporate location of Johns-Manville in 1935, at 22 East 40th Street, New York, N.Y., with its logo, a letter saying, among other things, "I quite agree with you that our interests are best served by having asbestosis receive a minimum of publicity."

For this defendant to come to you and suggest that only recently the knowledge of asbestos exposure has been known, or the extent to which it has been developed over the years has been known, is, I believe, an affront.

Coupled with that, we have detailed in our extensive statement a litany of incidents starting in 1929 and continuing through the present time. This happens to be a culmination of the outrageous conduct of Manville which is contrary to the suggestions by Mr. Parker.

For example, it is very clear in the record that economic considerations only mandated or dictated the decision of Manville not to tell its workers about the very thing that these exhibits portray.

The reprehensible conduct continues to date. The filing is just another example of that, and I cannot come to you to tell you that this surprises me. The Manville filing did not surprise me. Perhaps the timing might have surprised us a little bit, but as an example of a continuation of the type of reprehensible conduct that this company has put forward for 50 years, it did not surprise us that they would seek another method by which to deny just compensation to victims on an individual basis.

That is in spite of the fact that Manville is financially healthy, able to pay its debts as they come due, and is in a sound financial position, as demonstrated by their own admissions in the record.

Senator Dole. If I could interrupt, what about their argument that there are still 32,000 claims out there? What is their financial picture going to be 10 or 20 years from now if you take care of 16,000 or fewer now and there is nothing left for the 32,000?

Mr. Henderson. I would suggest, Mr. Chairman, that the support for that is found in their papers by a professional in Boston. And the only analogy we can come up with—I am sure we can come up with similar analogies—is the analogy of the copper company who decides that it is not going to pay its present bills to its suppliers, and the reason it is not going to is it has gone out to find an economist to say that copper prices are going to go sky high. And then it decides to file for chapter 11 and seek the extraordinary protection under chapter 11 to avoid paying its current operating expenses.

I cannot say that this is anything different from what Manville has done under these circumstances because briefly but comprehensively, the statements upon which Manville relies are too conjectural and too speculative for this committee or any other body to consider as valid.

If the Chair would permit—I know my time is running short and I do want Ms. Gentile to have the opportunity to present the story of her father's difficulties—I would like to get into the check payable to James Smith that was returned and not paid.

CASE OF JAMES SMITH

Mr. Smith's case commenced in Knoxville, Tenn., in the latter part of July 1982. After a couple or 3 days of trial—his case was an asbestos cancer case and he was 62 years of age. The lung cancer had metastasized, or it had spread to the liver. He knew he was quite ill. He decided to accept a lesser sum, in spite of recommendations to the contrary from his lawyer.

He accepted the sum of $60,000 from Manville, only to find out—fortunately, he did not find out before he died, but his attorney found out and his widow found out—fortunately, he was led to believe to his grave that this money had cleared and that his dependents were going to be cared for.

To the contrary, it was returned and not paid by the Manville Corp. as a result of this filing. We submit that this is not an isolated incident, Mr. Chairman. This is something that has gone on in repeated manner all over the country as a result of the Manville filing.

Senator Dole. What is the date on that?

Mr. Henderson. The date on the check is August 10, I believe, of 1982, about 16 days before the filing.

If the Chair pleases, although the check has been made part of the record, the two exhibits—the letters dated October 1 and October 3—have not, and we would respectfully request that they be made part of the record.

Senator Dole. They will be made part of the record.

Mr. Henderson. And we will supply those to the Chair.

[The letters referred to follow:]

84

Bridgeport, Conn.
Oct. 1, 1935

Mr. Vandiver Brown, Attorney,
Johns-Manville Corp.,
22 East 40th St.,
New York City.

My dear Mr. Brown:

Enclosed is copy of a letter received from Miss Rossiter, of "Asbestos."

As I see it personally, we would be just as well off to say nothing about it until our survey is complete. I think the less said about asbestos, the better off we are, but at the same time, we cannot lose track of the fact that there have been a number of articles on asbestos dust control and asbestosis in the British trade magazines. The magazine "Asbestos" is in business to publish articles affecting the trade and they have been very decent about not re-printing the English articles.

I shall be pleased to have your opinion in the matter.

Very truly yours,

SS-G.

Enc. President

RM 125pl
11.29.77

(Letter from Sumner Simpson, President of Raybestos-Manhattan, Inc.)

Johns-Manville
TWENTY-TWO EAST FORTIETH STREET
NEW YORK, N.Y.

Tuesday
NY
8.5

October 3, 1935

Mr. S. Simpson, President,
Raybestos-Manhattan, Inc.,
Bridgeport, Conn.

My dear Mr. Simpson:

I wish to acknowledge receipt of yours of October 1st enclosing copy of the September 25th letter from the editor of the magazine "ASBESTOS". I quite agree with you that our interests are best served by having asbestosis receive the minimum of publicity. Even if we should eventually decide to raise no objection to the publication of an article on asbestosis in the magazine in question, I think we should warn the editors to use American data on the subject rather than English. Dr. Lanza has frequently remarked, to me personally and in some of his papers, that the clinical picture presented in North American localities where there is an asbestos dust hazard is considerably milder than that reported in England and South Africa.

I believe the question raised by Miss Rossiter might well be considered at the committee meeting scheduled for next Tuesday, at which I understand both you and Mr. Judd will be present.

Very truly yours,

Vandiver Brown
Vandiver Brown
Attorney

VB:T

[illegible]

[illegible] 10/8/35

R.M 124-A
4-29-77

Mr. **Henderson**. In short and in conclusion, just one brief word, Mr. Chairman. In short, the bankruptcy laws were just simply never designed and never intended to eliminate the American tort system, which is what Manville is attempting to do.

I would like the Chair's indulgence for Ms. Gentile——

Senator **Dole**. Could I just ask one question about the letter with the Johns-Manville letterhead? It says signed by Mr. Brown, attorney. Was he their corporate attorney or their general counsel?

Mr. **Henderson**. He was their general attorney, and unless Mr. Parker has any objection, I would cast Mr. Brown in the same capacity, at least before Mr. Parker was promoted, as Mr. Parker is now. He was the general attorney for the Johns-Manville Corp.

Senator **Dole**. Mr. Parker?

Mr. **Parker**. Perhaps I could be helpful on those letters, Senator. Those letters were concerned with the situation existing in England at the time in the asbestos textile mills—quite a different situation than the disease-causing problems that we are concerned with today.

The asbestos textile mills were in the business of weaving asbestos fiber into textiles. It was an extremely dusty operation. The asbestos insulation product which we are concerned with had been in use since 1895, not having caused any significant or known disease problem, until it was used in the shipyards and in other work in World War II, being sawed with power saws and creating, again, an extremely dusty situation which gave rise to the disease that we see today.

Mr. **Henderson**. You are treading on my time, Mr. Parker.

Mr. **Parker**. With your indulgence, the other aspect of the shipyard work in 1942 was that the most intensive work was done in tearing out insulation in the ships of our allies—insulation which had been installed in England and in Europe earlier, and it was an insulation not manufactured by Manville or produced in this country or in Canada.

I think the correspondence there goes on to say, Senator, that these letters and this information from England should not be published until the studies which Manville had underway at the time were concluded. Those studies were concluded and that information was made public.

I would also like to point out, sir, that the bankruptcy laws require that prepetition debts which have not been paid at the time of the filing would not be paid until the bankruptcy plan of reorganization is confirmed by the court. This check which was dated August 10 was mailed to our counsel in Knoxville. It was received by him on August 14 and delivered to plaintiff's counsel on that same day.

Unfortunately, plaintiff's counsel did not get around to cashing the check until after August 26, and he, along with our commercial creditors—banks, and others—are caught up in the chapter 11 filing.

Mr. **Steinberg**. I must respond to that, Mr. Chairman.

Senator **Dole**. Right.

OTHER UNPAID CHECKS

Mr. **Steinberg**. This is not an isolated instance. We have got a few of them around our office and they were submitted for payment well in advance of August 26, and many of them were returned as unpaid because of the filing. Manville, by their own statement, had $15 million in cash the day they filed. They indicated in their "Dear supplier" letter that they were going to increase that amount at least by double in the following month.

I would virtually guess that they have in excess of $100 million today, and these checks go unpaid.

Mr. **Rosenberg**. Mr. Chairman, so there is no confusion, we do not dispute the proposition of law that Mr. Parker just stated, that prepetition, outstanding checks are to be dishonored. Rather, it is being presented to you to show the continuing course of conduct of Manville, right down to the date of the filing of the petition.

CASE OF JOHN MANTI

Senator **Dole**. Judy?

Ms. **Gentile**. My name is Judy Gentile and I am the daughter of John Manti. This is my mother, Jean, and my sister, Linda. We are a family united to fight and to stand together to see that this does not happen to other people.

We would like to tell you a little bit about the pain our family went through. If you can each take the person that you love the most in this world and put them in my father's place, then maybe you can understand our pain and our anger.

My father was a very healthy man. One of the doctors told him he had the body of a 19-year-old. He was a very good bowler and that was his hobby. He was a family man and a religious person. We were very close, and when we found out that my father was sick, he was told that if he did not have an operation, he would only have about 18 months to live, so he went through the operation.

SERIES OF OPERATIONS

When they opened him up, they found that the cancer was worse than they expected. The biopsy proved that there was cancer from asbestos fibers in his cancerous lung. My father underwent several operations within the next 3 weeks—emergency operations—because they could not get all the cancer out, and they left a fistula, which is a hole, at the bottom of the bronchial tube there and he almost drowned in his own fluid.

That operation was an emergency operation that happened at his bedside. That was the only time my mother was not at his bedside, because they made her leave the room. The other operations, they took a week later and removed his ribs on that side, all except for about three, because they were hoping that maybe it would help heal.

What happened is there was a hole in his side that you could put your fist in, and my mother had to learn how to irrigate and pack it with kling three times a day, and she is not a qualified nurse.

FINANCIAL COST

The money ran out; there was no workmen's compensation, there was nothing. We waited 9 months before we got our first hearing. This outraged our family, but we still fought, and it was on this day 1 year ago that my father received his first workmen's compensation check after he received 100 percent disability. He died 9 days later. He died thinking that everything was going to be taken care of, but there are appeals and more appeals and we have been back and forth.

I am telling you that when my father was sick and was in the hospital after 70 days, his insurance with Blue Cross and Blue Shield ran out and he had to leave the hospital. That was after about his third or fourth operation. We cried; the nurses cried. We did not know what we were going to do.

My mother was going to sell her house, but the doctor said that would not even be enough to cover the cost. So, luckily, he was able to go to a veteran's hospital, where they put him in a room with no oxygen. And through outraged doctors and my family, they finally got him out of that room and into a room by himself. They were understaffed.

It was then that my sister and my mother and I took round-the-clock turns sleeping in a cot next to his bed so that we could take care of him and so that we could get him a urinal, which they did not even have in the hospital. They had to search for 3 hours to find him one.

You cannot believe what we went through, sleeping there, ringing for a nurse. The bells were turned off because they were having a meeting. We listened there at night to other patients who were in the hospital suffering, trying to do the best we could.

We finally, after 3 weeks, took him home where we took care of him. My mother every day packed his side, irrigated it. We used to pour this saline in his side and roll him back and forth, hoping we could get all the infection out, and then turn him to his side and try to drain it, and then we had to pack it and pack it. I had to learn to do it in case my mother got sick.

We were a very close family. On Easter, my father sat there at the table and he said to us—my sister, my husband, her husband, my mother—

> I do not want to hear that we are doing this for blood money. I worked hard for my family and my children. My family comes first. I worked 27 years in this business, and if you do not do it for me, you get out there and you do it for everybody else. You fight.

And I will do my best and my family will do its best; we are a united team. We are representing every person in this country who ever worked with asbestos, who ever came in contact with asbestos, and who has to go through the hell that my father went through.

Thank the Lord, he had a peaceful death with us at his side. I am telling you that not only am I outraged because Manville knew before this that this stuff was dangerous—and this is just part of the coverup. Why did they not take better safety precautions?

Yes, you are right; asbestos dust is flying all over you. As my mother did my father's laundry, we played in the clothes. Who knew it was dangerous? My mother, my sister, and I have a 33-percent chance of getting asbestos cancer.

My father came from a healthy family. His mother right now is 86 years old and still alive. His father, at 82 years old, died a normal death. He has healthy brothers and sisters; no cancer on his side of the family.

I am just outraged. I am not only mad, but I feel like what they have done is outright murder. They knew what they were doing. It would be the same thing if I turned on a gas tank right here and asphyxiated everybody in this room, or made you sick. I would know what I was doing, and they knew what they were doing.

These bankruptcy laws were not set up so that they could be used to take away compensation from people who need compensation. If my father would have had compensation earlier than all the time we waited, he would have had a private nurse come to the house to take care of him. He would have been able to stay at Johns Hopkins Hospital and receive the best care. We could have had someone stay with us so that my mother could have gotten some sleep.

It was hard. My father loved his family and we were by his side. My sister and I left our business. By the way, we are in a corporation, also, and we pay taxes and we have employees and we take care of them. We left our business to take care of our father and to help my mother the best we could.

I feel like the Johns-Manville Co. should be working, if it takes them 50 years—even if they have to work for nothing—to pay back what they have done. They have taken 50 years of our people's lives. How many of them have died that we do not even know died of asbestos cancer? How many are going to die? How many are going to suffer? How many families are going to go through the hell we went through?

If more people would have come forward earlier and fought for this and fought to make things known, safety precautions could have been taken and people could have been spared some of this.

The pendulum is about to swing in the other direction. These companies have to be made liable for what they have done. They can lower their salaries; they can do without all the high benefits and the fancy cars. My father will not be able to enjoy any of this. He is dead and there is nothing in this world that can bring him back.

My mother will not be able to get her life even slightly back into order until this can be resolved. She was married when she was 16 years old and my father protected her and worshipped her and loved her for 38 years of their life.

All I can say is these laws were not made so that corporations can get away with murder. These laws were not made so that innocent people could suffer and not be compensated. We will do whatever we can to make it known to people and to fight to make these laws better.

I am not an educated person, but I am sure I am learning a lot about the system. And I hope that if each one of you will take the person that you love the most in your life and put them in our place, maybe you can feel the pain that we are feeling right now, because no amount of compensation is going to bring my father back.

But we are going to do our best so that the other people who are out there, when they get sick, can have the medical care and can have the ambulance to take them to the hospital, where we did not have the ambulance when my father had to go for radium treatments. We had to carry him in a chair, which was so painful. Family and friends came forward and loaned us money so that we could get a porter van, which was $55 a day, to take him to the hospital for this therapy.

He was put back in there for another operation because the cancer had metastasized and had gone to his leg. They had to put a steel rod in it and he was not able to walk anymore.

I will tell you, and end this, that we have to do something for the people because the taxpayers are the ones who are going to foot the bill if the insurance company and Johns-Manville do not. Thank you.

Senator DOLE. Thank you very much. We are trying to figure out some way to address the questions you raised and the questions that others have raised. When we have a healthy corporation that goes into a chapter 11 proceeding, it certainly raises some questions that I think we must address.

Mr. Steinberg, the experience of two insurance companies that have paid out probably about $90 million in asbestos litigation indicates that about 60 percent has gone to pay attorneys and witness fees and court costs. If these figures are accurate, is not the current court system very inefficient in compensating asbestos victims?

If they are going to pay that much to attorneys, there has got to be a better way to settle these cases.

MANVILLE'S DEFENSE COSTS

Mr. STEINBERG. Mr. Chairman, as I indicated in my earlier remarks, there is no question that the Manville Corp. has spent a lot of money in attorneys' fees, and certainly a lot of money in attorneys' fees to defend the cases.

They have spent years and I do not know how many dollars trying to contest the authenticity of the document we see up there on the letterhead of Johns-Manville, signed by their own corporate counsel. This is going on around the country in every jurisdiction in which cases have been tried. Over and over and over again, they have contested the authenticity, and spent millions of dollars doing it.

If there were some honest effort made to resolve these cases within the civil justice system rather than to outwardly and vigorously contest each one of these cases in order to evade and deny liability, I think defense costs would be way down. The ratios would change dramatically; we would have a lot more for payout and a lot less for attorneys' fees.

Senator DOLE. Right. Well, my question is based on estimates from insurance companies, not Johns-Manville.

Mr. STEINBERG. Well, the payout that has been made to date, I believe, as Mr. Parker indicated—up to 1981, most of the payout that was made on Manville's behalf was made by insurance companies, both for indemnity as well as for defense costs.

So the figures that I believe the Chair is reading from include figures that apply to the Manville Corp. and defense costs as well.

PRECEDENTIAL EFFECT

Senator DOLE. As I understand it, there are two other asbestos defendants who have also sought chapter 11 protection. Are you aware of that?

Mr. STEINBERG. Yes, the Amatex Corp. and UNR Industries in Chicago.

Senator DOLE. Now, do you object to their proceeding under chapter 11?

Mr. STEINBERG. Well, the Amatex situation is very recent, and, very frankly, I am not sure what they allege in their petition as to their current financial situation. I do know that the UNR Industries filing—their balance sheet certainly does not show the same figures as the Manville filing does. I am hesitant to make a judgment based upon that, but it could be that current claims may overwhelm current assets and current ability to pay. That is a possibility.

So we do not say in every case that this should be the result, but certainly in the Manville situation, with over $2 billion in assets, one is hard put to believe that there is any problem with imminent financial chaos.

Senator DOLE. If Manville is able to utilize the bankruptcy courts successfully to resolve its asbestos product liability litigation, would it be reasonable to expect other industries facing major product liability litigation to also seek protection from the bankruptcy courts?

Mr. HENDERSON. If I might, Mr. Chairman, I would like to respond to that. The gnawing fear that I have and that others have—and in my concluding remarks that it is our feeling that the bankruptcy laws were not intended nor designed to eliminate the American tort system—I do not think it was ever the intention of you or any other Member of the Senate that when that 1978 code was adopted, we would be here today discussing a situation with a $2 billion corporation, with $1.1 billion in assets, considering whether or not the spirit and intention of the bankruptcy laws were proper.

Yes, we are terribly concerned with the precedential effect that this would have, as already manifested by the Farm Bureau case and the PBB situation in Grand Rapids, Mich., as well as the Amatex and the Anarco matters. I am quite concerned that we are on our way to the abolition of the entire American tort system if Manville is able to do what it is doing today.

Senator DOLE. Should the Federal civil rules or enabling legislation be amended to allow for easier joinder in class action suits, such as in the Manville situation?

Mr. HENDERSON. Mr. Chairman, again, please.

POSSIBLE AMENDMENT OF FEDERAL RULES

Senator DOLE. Yes. Should the Federal civil rules or enabling legislation be amended to allow for easier joinder in class action suits, such as in the Manville situation, and should there be more consolidation? Should we make some changes in the law?

Mr. **Henderson**. Absolutely, and one of the things that Mr. Steinberg was mentioning earlier was the streamlined procedures that we have consistently requested of Manville, and to which there have been just as consistent denials or refusals to engage in such discussions, but rather to deal in the same expensive process of having to prove the authenticity of these documents or to prove the depositions taken of various corporate officials over a period of time.

Indeed, in the latter part of 1978 and the early part of 1979, I attempted to have these cases placed before the panel on multidistrict litigation, and Manville and every company to a man, with the possible exception of one, resisted that effort as well.

So there have been attempts on our part to bring this whole management problem into a perspective from which we could deal on a more cost-efficient basis in terms of handling these cases within the system.

Senator **Dole**. Mr. Sears, do you have any statement to make, or Mr. Rosenberg?

Mr. **Sears**. I really do not have anything to add to what has been done here, Senator, except to say that this is, of course, a very pressing problem and one that we do feel that if the Manville action is allowed to stand by the Congress, the Congress will have decided a policy question that I do not think it meant to decide.

Really, the flood of litigation in this kind of field is going to make it very, very attractive for many companies to keep from standing up to their tort liability and their product liability by making use of the bankruptcy laws—really, an item that I do not think the Congress has ever really meant to engender here.

EQUITABLE INSOLVENCY

Mr. **Rosenberg**. Just a short comment, Mr. Chairman. I heard Mr. Parker's testimony respecting his belief as to what equitable insolvency means. He must be reading different cases from the ones I read. My understanding of the law is that equitable insolvency means a present inability to pay debts as they mature, not a future, speculative inability over the next two decades—not 2 years, but two decades—based on what might happen, based upon speculative statistics.

If this is permitted, then there are simply no limits and I do not think that is what Congress intended.

Senator **Dole**. Well, obviously, that is the part that troubles me and I imagine will trouble other members of this committee. I am not certain what was contemplated by Congress in 1978 or at any prior time on this issue, but at least we have a better focus on it now. We need to find a more effective way to handle these cases.

I am not certain that asbestos sufferers may not be victimized twice if we in the Congress do no develop some better way to handle the cases. I don't know if whether chapter 11 is the correct way, but I do not fault the attorneys.

I assume these hearings will at least indicate to other Members of Congress that we need to act on this problem. We have got one deadline, December 24, which is important to this case in some aspects. I am hopeful that I can get the attention of my colleagues when they come back at the end of this month and see if we can focus on this problem.

It may be that we will want to submit additional questions in writing before that time. Thank you very much.

Mr. **Steinberg**. Thank you, Mr. Chairman.

Mr. **Henderson**. Thank you.

Ms. **Gentile**. Thank you, sir.

Senator **Dole**. Thank you, Judy.

[The prepared statements of Mr. Steinberg and Ms. Gentile and additional submissions for the record follow:]

TESTIMONY OF THE ASBESTOS LITIGATION GROUP TO THE SUBCOMMITTEE ON COURTS, U.S. SENATE COMMITTEE ON THE JUDICIARY, NOVEMBER 10, 1982

PRESENTED BY ROBERT STEINBERG, ESQ., LOS ANGELES, CALIFORNIA

Mr. Chairman, my name is Robert Steinberg. I am an attorney in Los Angeles. I appear before the subcommittee today representing the Asbestos Litigation Group. The ALG is a consortium of approximately 150 lawyers who collectively represent about 90 percent of the 15,550 disabled asbestos victims -- including construction and shipyard workers, former Manville employees and other users and consumers of Manville asbestos products -- and the families of deceased victims currently suing the Manville Corporation.

On August 26, 1982 the Manville Corporation -- the largest supplier and manufacturer of asbestos and products containing asbestos in the world -- filed for bankruptcy under Chapter XI of the U.S. Bankruptcy Code. Unlike the growing number of troubled companies forced to take similar action, Manvile's petition to reorganize did not represent financial failure. In fact, this Fortune 500 company is operating firmly in the black and in no danger of losing its coveted place on the list of 30 "blue chip" companies comprising the Dow Jones Industrial Average.

The bankruptcy decision was motivated by Manville's desire to suspend indefinitely the legal claims filed by the victims and their families whose lives have either been lost or irrevocably damaged by asbestos exposure. Manville's intention is to not only discharge into bankruptcy those 15,550 claims presently pending, but also the additional 32,000 claims which its consultants project will be filed over the next 20 years. Manville justified the bankruptcy action as its only recourse because it alleged the financial output for legal fees and compensation to current and future victims would eventually overwhelm its assets.

We believe this is a gross misuse of bankruptcy law that, if uncorrected, will (1) further injure thousands of individuals already harmed beyond repair by the Manville Corporation; (2) take away the legal rights of present and future asbestos victims, and (3) establish a dangerous precedent that could permit other corporations to insulate themselves from legal accountability for their actions (the only real sanction against the design and manufacture of unsafe products). Manville's action raises serious economic, legal and moral questions we believe the Congress must address:

o Should bankruptcy law be used as a haven for a profitable company to evade legal responsibility for intentional actions which have irrevocably harmed thousands of users of its products? We do not believe that was the intent of Congress in enacting the 1978 reforms.

o If bankruptcy law is truly to provide protection for companies and individuals faced with real and imminent financial danger, then Johns-Manville should not be sheltered by that law.

There is no dispute that Manville is, by its own admission, operating "at better than break even,"1/ or that it's net worth exceeds any realistic estimate of Manville's liability for asbestos claims (see Tables I and II), or that Manville believes it will be profitable in the future.2/

The fact is, Mr. Chairman, Johns-Manville is not now, nor will it be in the near future, unprofitable or so beseiged by asbestos claims that it must close its doors. Its bankruptcy petition is based on more "ifs," "buts" and "maybes" than a child's Christmas list. Indeed, Manville's bankruptcy petition would fail any "good faith" standard, such as one present in bankruptcy law prior to 1978.

o The final question we believe this subcommittee must address is a moral, rather than a legal one. In this society, which is founded on the principles of human rights, should the rights of a corporation be so powerful that it can effectively override the rights of real individuals, living and dead? That

---

1/ Manville advertisement, August 27, 1982, in numerous major newspapers.

2/ 1981 annual report of the Manville Corporation, p. 5.

question is not cosmic, but rather goes to the heart of America's judicial system -- and it is central to the matter before this subcommittee. We must not lose sight of the fact that the contest here is between flesh and blood people and a wealthy, profitable corporation.

Mr. Chairman, the ALG believes that there are five reasons why the Congress should act as expeditiously as possible to correct the oversight in the Bankruptcy Reform Act of 1978 that arguably appears to permit the Manville action of August 26, and to also correct the injustices that would occur if the Manville petition is granted:

1. Bankruptcy law should protect individuals and companies from imminent danger of financial embarrassment or failure for which there is no other protection. Manville's claims of financial disaster are speculative at best. We do not believe that the Congress ever contemplated that a corporation would use the bankruptcy law in the way and for the purposes Manville is trying to use that law.

2. Because of the automatic stay provisions of bankruptcy law, the rights of the nearly 16,000 present asbestos claimants are being violated. Trials which had been waiting for as long as 3-5 years are being postponed. Suffering is being prolonged. As Gladstone wrote: "Justice delayed is justice denied."

3. The rights of potential asbestos victims as yet undiagnosed are being jeopardized. Although the Manville Corporation maintains that it is trying to protect the rights of future victims by filing for bankruptcy, we question its sincerity. After all, this is the same corporation that deliberately exposed its own workers and the public to a substance it knew to be disabling and fatal, and then fought their claims in every conceivable way.

4. The set of conditions from which Manville seeks the relief of bankruptcy court is neither sudden nor beyond its control. Indeed, bankruptcy is only the most recent in a more than 50-year history of deliberate actions by Manville to avoid liability or to cover up the hazards posed by asbestos.

5. Many of the legal costs that Manville cites as the cause of any bankruptcy or insolvency that might in fact occur sometime in the 21st Century are of its own making by stonewalling and refusal to settle. It was Manville, not the victims' lawyers, which chose to contest every claim, to unduly delay proceedings by interminable challenges to evidence already accepted by scores of courts, to reject all efforts to streamline procedures to both curb costs and speed justice, and to refuse to fairly settle, just and deserving claims.

If I may, Mr. Chairman, I would like to elaborate on each of these reasons. But, first, I would like to emphasize that if the Congress makes it clear that it did not intend -- and will not countenance -- such a misuse of bankruptcy law, then each of these points is superfluous. But as long as Manville remains in bankruptcy court and continues to make a profit, these points are not superfluous to the members of the ALG; they are the source of our indignation and outrage.

We do not apologize for our deep, emotional involvement in this issue. To us, Manville is more than a legal adversary. Its corporate actions shake our faith in the free enterprise system. Too many victims of asbestos disease have died for their survivors and friends to shed a tear for a company that has shown so little compassion for the victims of its willful acts. If Manville is successful in this attempt to misuse the law to evade responsibility for its deliberate, intentional actions, then our faith in the legal system will also be shaken.

I am sure, Mr. Chairman, as we elaborate on our testimony that the members of the subcommittee will share our belief that the greatest injustice committed against the victims of asbestos and their families would be to deny them the justice of our courts. Two wrongs do not make a right. Manville was wrong to expose so many individuals to a product it knew for at least 40 years was hazardous, and it would be wrong to let Manville escape its liability merely because it sees a way to increase its profits in the future.

I. The Johns-Manville Corporation is not bankrupt nor will it be in the near future.

The economic facts simply do not support any contention that Manville is financially bankrupt. Its net earnings of $60.3 million for 1981 prompted the company to boast in its annual report that:

"Despite the unfavorable economic environment in which the Company has had to operate during the past few years, improved operating flexibility and efficiency and stringent controls on expenses have enabled the Company to remain profitable, unlike many of its competitors and companies in other cyclical industries."[3]

Manville's CEO, John A. McKinney, stated in full-page newspaper ads that appeared the day after the company filed under Chapter XI:

"During the current recession our sales have held up well and we've operated at better than break even (if you exclude litigation expenses). . . We'll continue to generate substantial cash flow. Our Chapter XI lawyers tell me Manville has stronger businesses and cash flow than any other big company that's ever filed."

He went on to say that Manville doesn't "expect any significant problem in making full, timely payment for new shipments after our filing." We find this statement particularly ironic in view of the fact that Manville has stopped payment on settlement checks to successful claimants, such as the check which appears as Exhibit A. Johns-Manville has also announced that, under provisions of the Bankruptcy Code, it will not pay out any more money due asbestos plaintiffs as the result of settlements.[4]

Suppliers, yes; victims, no.

According to the Wall Street Journal, Manville's increased profit in the third quarter of 1982 doubled that of a year earlier and significantly narrowed the company's loss for the first nine months of 1982. In fact, the loss for 1982 to date is nearly the amount of money Manville reports in costs for its bankruptcy proceeding.

---

[3] 1981 annual report, p.4.

[4] The Wall Street Journal, October 6, 1982.

As the Journal noted: "The latest results seem to underscore the company's curious position of being financially strong and yet operating in a bankruptcy proceeding."

According to a letter Manville mailed to its suppliers on August 27 and which is appended to our testimony, its "domestic assets are virtually unencumbered." Manville has "over $1.4 billion in net book value of unmortgaged property, plants and equipment." The letter goes on to point out that "approximately $600 million in net book value" of other Manville consolidated assets "are virtually all unencumbered." Manville claimed that it entered Chapter XI "with approximately $15,000,000 in cash, which will at least double (after all current payments) by the end of September." Mr. Chairman, these are hardly the balance sheet entries of a destitute company.

Using only what Manville says are the average costs of settling asbestos cases, it is impossible to come up with a scenario that the pending asbestos cases and even the 32,000

TABLE I 5/

(Number of cases and average cost of settlement from the affidavit filed by James F. Beasley, Manville treasurer, under Local Rule XI-2 with the Bankruptcy Court for the Southern District of New York.)

Cumulative average claim cost for all cases disposed of through June 30, 1982:	$16,600
Number of cases pending	x 15,550
Potential liability	$258,130,000
Cumulative average claim cost including cases subject to post-trial motions or appeals filed by Manville:	$20,690
Number of cases pending	x 15,550
Potential liability	$320,695,000

5/ Note: Both the average claim cost for all cases settled and those pending on appeal are presented to show that even at the higher cost for the latter category, Manville's financial exposure is minimal compared with its assets.

Manville envisions in the future would bankrupt the company. In other words, even if every outstanding claim were settled in the same year -- a highly unlikely prospect -- the company's potential liability would be large, but hardly enough to sink the corporate ship. In fact, for the years 1979 to 1981, Manville had net earnings of more than $255 million or nearly enough in profits alone to cover all claims filed to date at the historic average cost.

TABLE II

(Number of cases filed and the average settlement costs are from the Beasley affidavit, ibid. Figure for number of cases anticipated from Manville ad, Aug. 27).

Cumulative average claim cost:		$16,600
Pending claims:	x	15,550
Anticipated claims:	+	32,000
Potential liability		$789,330,000
Average claim cost including Cases on appeal or subject to post-trial motions		$20,690
Current or anticipated claims	x	47,550
Potential liability		$983,809,500

Even if all of the cases Manville foresees in the future -- a number that ALG believes defies quantification -- the potential liability, based on average settlement costs, is less than the corporation's present net worth. Again, such a catastrophe assumes that every case would be decided in the same year and that Manville will earn no income over the next 30 years.

Further, Manville indicates that it has $650,000,000 of additional insurance which is presently in litigation in California. Exclusive is attorney fees for defense, the total potential projected liability of $789,330,000 based on the historic average disposition cost for indemnity per case. This is only about $140,000,000 more than its applicable insurance coverage, or about 10 percent of Manville's net book value of unmortgaged property, plants and equipment. These calculations are without regard to the fact that the total potential liability which, when reduced to present worth, will be well within its applicable insurance coverage.

What these figures demonstrate, we believe, is that meeting its legal obligations is, at least for Manville, hardly the impending doom even the liberalized bankruptcy law intended to forestall. Indeed, the assumptions that every case -- those known about and those as yet unknown -- will be decided within one year, and the corporation must bear the entire cost are unrealistic. As the corporation's 1981 annual report stated: "Substantially all of these disposition costs have been charged to applicable insurance."[6/]

In an effort to balloon the cost projections, Manville is now including its legal costs in estimates to come up with an average claim cost of $40,000. That's chutzpah. Manville is blaming innocent victims for the money it is paying its legions of lawyers to delay the victims what is rightfully theirs.

The only conclusion as to Manville's financial picture that can be reached is that which Mr. McKinney stated in full-page advertisements on the day following the filing of the petition: "Nothing is wrong with our businesses."

We have seen no evidence that disputes the statement in the corporation's 1981 annual report that, despite uncertainties as to the outcome of asbestos-health litigation, "it is anticipated, however, that costs and reimbursable payments associated with asbestos-health litigation will not have a material effect on the Company's liquidity during the next few years, if ever."[7/] (emphasis added).

II. Harm to present claimants.

Mr. Chairman, any additional delay in the adjudication of pending asbestos claims against Manville is particularly egregious to the victims. There is little question that the Chapter XI proceedings will either unduly prolong action on individual cases

---

[6/] Ibid., p.11.

[7/] Ibid., p.5

or result in the application of a rigid mathematical formula that dehumanizes individual suffering and ignores Manville's deliberate efforts to cover up the hazards of asbestos.

The ALG does not believe that the facts of either the illness or the manner in which it was contracted lend themselves to treatment as if the victim is just another creditor presenting a due bill. A paper company can present the bankruptcy court with paper documentation that Manville owes X amount of money for Y amount of paper delivered on Z date. But the victims and their families are people.

Dreams, companionship, love, human potential -- these are values which measure a society, and as such defy objective systems of measurement. The genius of the American judicial system is that such questions are usually left to a jury of human beings, not a computer or a slide rule. Yet, that is one of the two most likely scenarios that the bankruptcy court may use to settle the pending claims.

The other option, in which a single bankruptcy judge must receive and process nearly 16,000 pending claims, is equally unjust. For each claimant's case to receive an individual evaluation and adjudication, as is their right under our system of justice, would take years and years. Few of the victims who are presently living would be alive to learn if justice is ultimately served on behalf of their heirs.

Further, to receive that individual attention, claimants must travel to the Southern District of New York for the convenience of the court and Manville's attorneys. That is not very convenient for victims who must depend on respirators for the breath of life. It is not very convenient for survivors attempting to pick up the remaining pieces of their lives, hold jobs and tend to children many miles away from the court that is proceeding their claim.

As we have learned, delay is an integral element of the Manville strategy. The longer resolution of claims takes, the greater the likelihood that someone else will pick up the burden that logic, law, morality and humanity dictate belongs to Manville. Even though there is widespread opposition in the

Congress to a federally-financed compensation system for asbestos victims, the fact is that the taxpayer is already picking up the cost of the burden of the victims. The government is already paying a substantial amount to victims through the Federal Employee Compensation Act and the Longshoremen and Harbor Workers Act. In addition, no one knows how many victims and their families are receiving public assistance, Medicare and Medicaid, food stamps and Social Security benefits to widows and children -- or the total amount of the cost of these programs. But those of us who daily work with the victims firmly believe that whatever the amount, it is not enough for the victims and too much for the taxpayer to pay. It is a disguised bailout of Manville, and we resent it.

The net effect of the delay is a de facto shifting of responsibility for the asbestos victims from Manville to the taxpayers. While the ALG would almost assuredly oppose any legislation that the Congress might consider with that result, Manville is achieving much of the same result without an opportunity for Congress to work its will and establish the public policy.

Meanwhile, for the victims, the delay continues. In the bankruptcy proceeding, they lose their identity as human beings and become numbers. Just as the committee of creditors will agree on how much to pay on a bill for reams of paper, so too will they decide on how much for a lung and a life. We submit, Mr. Chairman, that is more than dehumanizing; it is repugnant to a society that claims to place the highest value on human life. Throwing such cases into bankruptcy court is the final triumph of property rights over human rights.

III. Harm to future victims.

The most tragic consequences of Manville's action in filing for Chapter XI will be suffered by those unknown numbers of individuals who have yet to suffer the ravages of asbestos-related disease. As the 1981 annual report of the Manville Corporation states:

". . . since at least the beginning of 1978, no significant new potential liabilities have been created for JM with respect to diseases known to be related to asbestos. . ."8/

Stated more clearly: JM has potential liability, at least that it admits to, for a 46-year period from the suppression of health hazards information developed in Great Britain until 1978 when the exposure standard finally became effective over the bitter-end opposition of Manville.

Because of the long period of latency of asbestos-related disease, many individuals who appear healthy today have already had their bodies violated by Manville products. What are their rights?

The short answer is that they have none, if Manville's petition is accepted. That is because the Manville Corporation that permitted their bodies to be violated will disappear, and with it will disappear all of its liabilities. But the people themselves will not disappear. The Manville Corporation maintains that its reorganization is based on its concern that future victims be protected. On what grounds do we believew Manvill's sudden concern for the individual that they have deliverately allowed to die or become disabled? Indeed, does Manville have any credibility at all?

Manville officers blithely suggest that the creditors might agree on some sort of pool of funds from which to pay future claims by some sort of compensation system. We do not believe that the process is as quick and simple as that. A creditor who is seeking 100 cents on the dollar will be unlikely to sacrifice any portion of that amount for someone who is not even in line as yet. Even if the creditors do take the view that something must be done for future victims, how large of a pool should be established? What criteria are to be used for payments? What happens to future victims who do not manifest illness until after the pool is exhausted? The future victims themselves, by definition, have no role in the resolution of those questions which are very important to their lives.

8/ Ibid., p. 10.

Mr. Chairman, there is a wide disparity in the treatment of future creditors. Manville has taken pains to reassure its suppliers that they will be paid in full for all deliveries after August 26. Yet if asbestos-related disease manifests itself in an individual after that date, those claims are thrown into the pool of pre-August 26 claims because Manville's liability occured before that date when the victim was exposed.

Assuming that Manville emerges from bankruptcy court in 1992, trade creditors at that time will be paid 100 cents on the dollar. Individuals who discover their disease at that time, however, will have to look back to an agreement made 10 years earlier for compensation -- an agreement made without their participation. Thus, it is obvious, that Manville's bankruptcy action is not fairer to future victims, as the corporation claims, but rather merely a means of dispensing with its liability.

The Manville Corporation that emerges from Chapter XI will have the same corporate officers; it will possess the same assets as the original Manville Corporation. The only difference -- I repeat, the only difference -- will be the absence of liability for asbestos claims.

Manville attempts to answer these questions with a question: what would happen to these individuals if JM was actually forced into receivership? But, Mr. Chairman, that assumes facts which don't exist -- principally, that Manville is close to bankruptcy now or for at least several decades.

But the fact remains that, given the current set of circumstances, these individuals do not have any rights in the present proceeding. There is only one way to assure these victims of their rights, and that is to deny Manville what it now seeks -- which is to totally avoid and evade its legal responsibilities.

IV. The cover-up.

Mr. Chairman, to properly understand and appreciate our outrage at Manville's attempted manipulation of federal bankruptcy laws, it is important for the subcommittee to know that Manville is not the innocent victim of unforeseeable circumstances it claims to be.

Manville has denied responsibility for America's worst industrial health disaster, claiming the hazards of asbestos exposure were only recently apparent and impossible to anticipate. But, the facts are that Manville undeniably possessed knowledge of the potentially disabling and potentially fatal consequences of exposure to asbestos dust for more than 50 years.

Asbestosis (a progressive lung disease characterized by shortness of breath) and mesothelioma (a fatal cancer of the chest or abdominal lining) are the direct result of asbestos inhalation. Further, lung cancer and gastro-intestinal cancer are too frequently the result of asbestos exposure. Through the years, asbestos has been increasingly recognized as an occupational health hazard of unparalleled proportions and currently is the greatest single source of occupational cancer.

Actions taken by Manville through its last 50 years of asbestos production reveal the company's awareness of these hazards, its callous disregard of the health effects to those exposed to asbestos, and its efforts to suppress evidence of the asbestos danger from its employees and consumers.

o In 1931 the Johns-Manville Corporation completed a scientific study on asbestos which included X-rays of a significant number of asbestos-exposed employees. The testing revealed 53 percent of the workmen suffered from asbestosis. After considerable discussion, Manville management deleted the startling test results from the final draft and delayed its publication for five years.

o By 1932, the British had documented fully the occupational health hazard of asbestos, and in 1935 England adopted strict asbestos exposure regulations. The American trade magazine Asbestos attempted to obtain industry permission to publish news of the British medical research and subsequent regulations. Vandiver Brown, counsel to Johns-Manville, participated in efforts to see that "asbestosis receive the minimum of publicity" and that the editors use data edited by Manville lawyers.

o In the early 1940s, the Mr. Brown enunicated the policies of Johns-Manville not to tell its employees of X-ray evidence of asbestos disease and to let those employees work until disabled because of asbestosis or until they die as a result of asbestos-related diseases.

o In 1949 Dr. Kenneth W. Smith, Manville's medical director, conducted an industrial hygiene study which revealed asbestosis in several employees. The company decided to withhold this information from the diseased employees so that, according to Dr. Smith, employees "I can live and work in peace and the Company can benefit from [their] many years of experience."

By 1955 government and private research had clearly established an association between asbestos exposure and cancer. Later, Dr. Smith sought to have an industry-sponsored study conducted "to procure information which would combat current derogatory information." After considerable debate, study idea was rejected because even conducting such a study would imply "that a relationship exists between asbestos and carcinogenic development."

o In 1929 the first asbestos disability case was filed. Hundreds of compensation cases were filed in the next several decades. In 1957 Manville was sued for money damages by a Manville product user who suffered from asbestosis and who complained that Manville withheld from him information on the health hazard of asbestos.

o During the 1960s extensive studies of the occupational effects of asbestos exposure were conducted by Dr. Irving Selikoff of the Mount Sinai School of Medicine, in New York City. The results were alarming: more than 80 percent of the insulation workers studied, who had 20 years exposure to asbestos, developed asbestosis; 40 percent of the workers' deaths were attributable to asbestos exposure with 20 percent directly related to lung cancer. Yet Manville continued to withhold from its employees early evidence of asbestos disease until about 1972 -- a practice characterized as the "hush-hush policy" in testimony given by a former Manville plant manager.

Manville's officers actually knew of such potentialities of disease and death for more than 50 years, yet pure economic considerations dictated the decision not to inform and/or otherwise protect exposed workers. Dr. Smith testified in the asbestos litigation, inter alia, that he and other officials of Johns-Manville knew of the potential hazards associated with exposure to asbestos and recommended warning the workers as early as 1952. The reason expressed to Dr. Smith by Manville officers for not adopting his recommendation was, according to Dr. Smith, that "if the application of a caution label identifying a product as hazardous would cut out sales, there would be serious financial implications."9/

Mr. Chairman, Manville is neither innocent nor a victim, any more than a convicted murderer is a victim. What Manville seeks to avoid is punishment for its crimes -- punitive damages. The thief who steals because he is destitute still must face punishment for his crime. And Manville is hardly destitute. In a number of recent cases, including an Ohio case recently reviewed and affirmed by the U.S. Sixth Circuit Court of Appeals, juries have awarded punitive damages.

That decision, which is appended to our testimony, dismissed the legal constructions Manville raised to avoid that punishment. Chapter XI is the only escape hatch remaining, short of a taxpayer-financed bailout, which we believe cannot be justified. That hatch must be closed, or the taxpayers will wind up with the de facto burden of caring for the victims of Manville's actions through existing assistance programs. If Manville cannot prove its case for taxpayer compensation through the front door, it should not achieve the same result by going through the back door. That action evokes a fraud on the victims, the taxpayers and this Congress.

Asbestos-related diseases are not "sudden" diseases, nor is Manville's liability sudden and surprising. And the settlement of claims -- given Manville's delaying tactics -- will also not be

---

9/ Deposition of Dr. Kenneth W. Smith; April 21, 1976.

"sudden." Therefore, bankruptcy at this moment is totally inappropriate.

V. Many of the legal costs are of Manville's own making.

Many and various reasons have been advanced to explain the surge in asbestos litigation (as recently as 1977, only a few hundred cases were pending). It is likely that many factors working together accounted for this litigation explosion: advances in medical and scientific knowledge and their public dissemination; more awareness and activity on the part of labor organizations; judicial decisions expanding the rights of injured persons, especially in the area of products liability; and energetic, competent trial attorneys willing to undertake representation on a contingent fee basis with a very substantial commitment of time and money.

Mr. Chairman, the lawyer members of the ALG have been castigated by Manville as part of its high-powered public relations campaign to justify Chapter XI. In its full-page newspaper ads, Manville has inflated the costs per claim from the less than $21,000 figure in its bankruptcy petition to $40,000. Since Manville officials swore to the figures in the petition filing, we are left with the conclusion that Manville is paying $1 to its attorneys for approximately each dollar it is paying to claimants.

We believe it is important for the subcommittee to understand exactly who is driving up the legal costs in these proceedings. It is Manville and its legal counsel.

Beginning in lat 1980, corporate officials at Manville drastically changed their litigation strategy in connection with asbestos-health claims. Manville decided to try more cases and to aggressively oppose even the most meritorious claims, rather than compromise and settle.

For example, Manville has repeatedly sought to challenge the authenticity of damaging documents written to and by various officials of Manville. In the case of one set of documents, Manville lawyers have forced the taking of repetitive depositions of the same witness. In every case, the court has accepted the authenticity of the document. Yet Manville refuses to stipulate the authenticity of the document in a meaningless charade that only adds to the income of its lawyers.

We can only conclude that such actions are not an effort to insure their client's legal rights, but rather a corporate determination to drag out the process through obstruction and delays.

The delays in the asbestos litigation have been due in large part to the time-consuming, duplicative (oftentimes mulitiplicative) efforts regarding fundamental evidentiary matters, such as authenticity of documents, use of depositions, and the like. Even more distressing is that such delays frequently are the result of internal squabbling among: the defendants; the defendants and their insurers; and the insurers. Settlements have been delayed significantly.

Up until the present time, including the filing of the bankruptcy petition, JM has never even suggested, offered or indicated any willingness to sit down with the ALG to streamline legal proceedings and costs. Perhaps, Mr. Chairman, a directive from this subcommittee would encourage Manville to sit down with the ALG and reach agreement on a range of streamlined procedures that would reduce the legal costs of all parties. The ALG would respond positively to such a directive.

Our position has been and is that the tort system, with its right to trial by jury, is the best and most appropriate way to resolve disputed claims. However, the ALG is not opposed to consider any reasonable system for handling the asbestos litigation. The only requirements which we feel essential are that it be voluntary, not involve taxpayer funding, provide full and adequate compensation on an individual basis, and provide for speedy resolution of claims.

Indeed, the ALG has indicated and reiterates now its desire to discuss alternative resolutions to this industrial health disaster. Preliminary discussions have occurred, and more importantly, we are willing to meet and discuss this further at any place and time. But now -- with the loaded gun of a phony bankruptcy placed against the heads of victims -- is not the time or the place.

In conclusion, Mr. Chairman, this subcommittee faces a public policy question that delineates what kind of a nation we are.

The filing of a Chapter XI petition by Manville Corporation represents an enormous abuse of the bankruptcy laws which Congress liberalized in 1978 for many legitimate and appropriate reasons.

The 1978 Act was never intended to permit a coporation with a net worth of one billion dollars to file a petition to rid itself of personal injury and death claims arising from exposure to a substance that that corporation knew was hazardous and fatal. The problem is compounded when it is realized that the liberalized law is distorted by Manville to support its argument that potential as well as present claims may be discharged. In other words, people who do not know they are injured and therefore have no present claim to assert against Manville could have their future rights eliminated through a bankruptcy discharge.

There are, according to Manville, some 15,550 suits pending against it and a projected 32,000 additional claims that will be filed over the next 20 years. To permit Manville to use the bankruptcy laws, in such an unintended fashion, will multiply the burden of asbestos claims on the already overburdened legal system. The state and federal court cases will still proceed against other defendants, and later those defendants against Manville in their cross-claims, and to that will be added the three bankruptcy courts where Manville and two other manufacturers have filed. Manville's move only adds to the delay and expense.

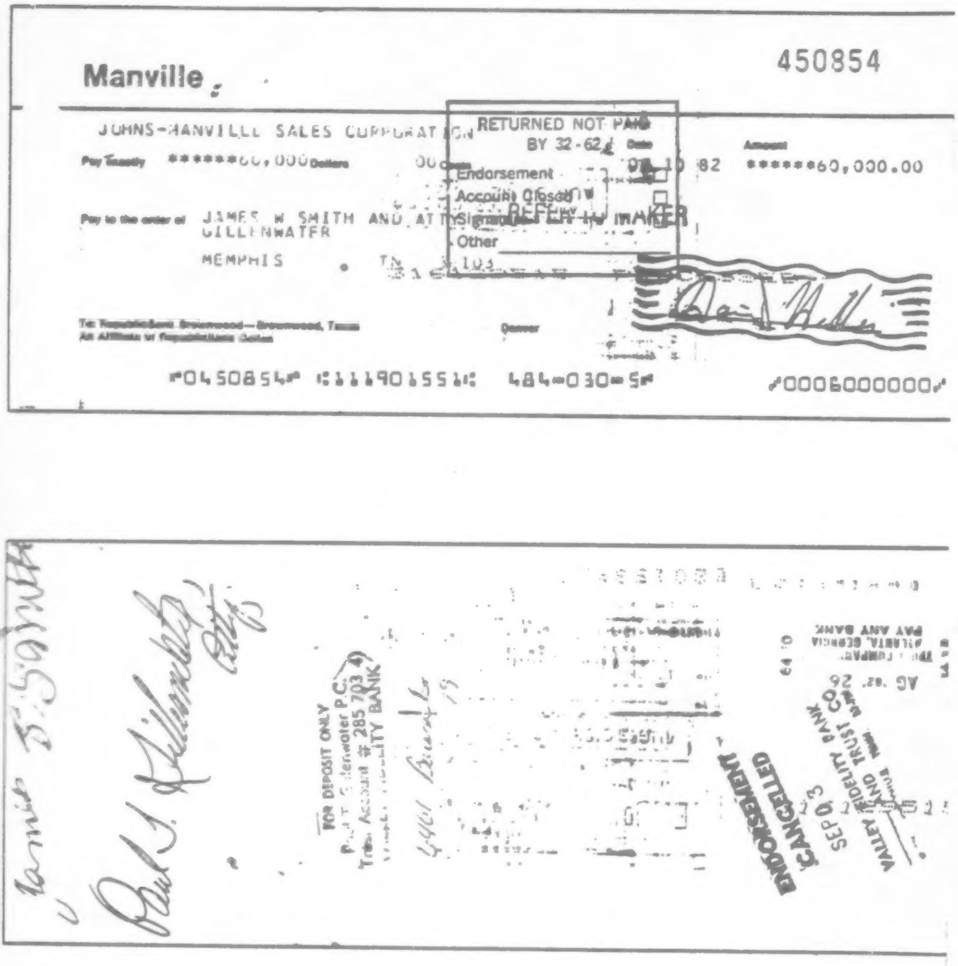
Bankruptcy court is not the proper court to handle the claims, counter-claims, cross-claims and third-party claims and issues which Manville intends to litigate in that court. Placing these matters in Bankruptcy Court usurps the jurisdiction of the state and federal courts, long viewed as the courts of competent jurisdiction over these matters, and dumps these matters into a bankruptcy court structure that simply lacks the resourses to handle the cases expeditously.

If Manville is permitted to cure its alleged present and projected ills through Chapter XI, other asbestos companies and other companies presently involved with significant product liability litigation undoubtedly will attempt to avail themselves of this abuse of the Bankruptcy Reform Act of 1978. Correcting the law now will avoid this.

But, when we reach the bottom line, the ultimate question is whether property rights take precedence over human rights, especially the right to life. We fervently believe they do not, and we are confident that the Congress never intended the bankruptcy laws to be used to permit a corporation to profit from capricious actions that result in death or disability for its employees and the users of its products.

We ask this subcommittee to make that fact clear -- by correcting the oversight in the 1978 law -- to Manville and any other corporation that might seek such an escape from what should be inescapeable: its responsibilities under the law.

EXHIBIT A



Manville

450854

JOHNS-MANVILLE SALES CORPORATION

Pay Exactly ******60,000 Dollars 00 Cents

Date 09 10 82

Amount ******60,000.00

Pay to the order of JAMES W SMITH AND ATTY
GILLENWATER
MEMPHIS TN

RETURNED NOT PAID
BY 32-62
Endorsement
Account Closed
Signature
Other
REFER TO MAKER

Drawer

⑈0450854⑈ ⑆111901551⑆ 484⸗030⸗5⑈ ⑈0006000000⑈

FOR DEPOSIT ONLY
[illegible] lenwater P.C.
Trust Account # 285 703 4
[illegible] LITY BANK

ENDORSEMENT CANCELLED

SEP 03

VALLEY FIDELITY BANK AND TRUST CO.

Manville Settlement Check Not
Honored After Bankruptcy Filing

Manville Corporation
Ken-Caryl Ranch
Denver, Colorado 80217

John A. McKinney
Chairman of the Board and
Chief Executive Officer

August 27, 1982

Dear Manville Supplier:

This is a letter I did not expect to write two weeks ago. As you know, our board of directors has reluctantly decided to file Chapter 11 petitions for Manville and its principal American and Canadian affiliates.

I can't tell you how agonizing it was to make this decision.

However, we all feel that making this choice at this time was in the best interests of the Company.

Enclosed is a copy of an interview with me explaining this development to the public.

There will be no change in our operations. The company is not going out of business.

We urgently need continued delivery of goods and services from you. The more successful the Company is between now and when our Chapter 11 plan is complete, the better able we will be to pay our pre-Chapter 11 obligations.

You should understand that:

1. Our domestic assets are virtually all unencumbered. For instance, on a consolidated basis, we have over $1.4 billion in net book value of unmortgaged property, plants and equipment.
2. Approximately $600 million in net book value of our other consolidated assets are virtually all unencumbered.
3. We entered Chapter 11 with approximately $15,000,000 in cash, which will at least double (after all current payments) by the end of September. We expect to build up substantially more cash in the next few months from operating cash flows resulting in part from the automatic suspension of payment of pre-Chapter 11 debts and stays of asbestos-health litigation.
4. All obligations incurred on and after August 26, 1982 will have priority over virtually all of our pre-August 26 liabilities.

We value our relationships with you, and we hope to continue them to our mutual benefit. In light of the foregoing, we expect to continue to do business with you on normal trade terms, as in the past.

Here are my responses to some additional questions I'm sure you have:

Q. Why did we have to take this step?

A. There was simply no other practical choice. We are beset with thousands of asbestos cases. The costs of disposing of an asbestos case have risen on average to about $40,000. All but one of our insurers are reneging on payments to us. Outside professionals have told us that asbestos disease claims are going to be a continuing problem for years to come. Our earnings and cash flow from operations won't cover the combined cash needs of the Company and estimated amounts which may become payable to asbestos claimants even if our insurers do make good. To avoid Chapter 11, we would have to strangle the Company slowly, by deferring maintenance and postponing capital expenditures. We might also have to cannibalize our good businesses just to keep going. As conditions worsen, we would have to mortgage our plants and properties and new credit would be most difficult to obtain and expensive.

This is an unacceptable way to go forward. Chapter 11 avoids these problems and preserves our operations.

Q. What is Chapter 11? How will it help us?

A. Under Chapter 11, the company keeps operating in the ordinary course of business. No court approval is needed for any activity taken in the ordinary course of business. The big difference is that, effective Thursday, August 26, all further prosecution of pending health and other lawsuits against the company is automatically stayed. New suits against the company are also stayed. This alone will result in a tremendous cost reduction for the Company.

Other than an initial short period of some confusion, we don't expect Chapter 11 to have any noticeable effect on our sales or operations.

The bulk of activity in Chapter 11 will consist of restructuring our debts, including our obligations to you, other creditors and asbestos-health claimants. As soon as a plan for even-handed treatment of all the creditors is worked out, we expect the Company to emerge from Chapter 11. It will be the same company. It will just have a different looking balance sheet.

I believe your continuing to supply our needs for your products and services will be beneficial to both of us. I hope we will have your support.

Thank you.

Sincerely,

John A. McKinney
Chairman and President

Enclosure.

BELEAGUERED BY ASBESTOS LAWSUITS MANVILLE FILES FOR REORGANIZATION

ATTENTION: MANVILLE CORPORATION SHAREHOLDERS, EMPLOYEES, CUSTOMERS, SUPPLIERS AND CREDITORS

On Thursday, August 26, Manville Corporation and its principal American and Canadian affiliates filed voluntarily for reorganization under Chapter 11 in New York.

In the following interview, John A. McKinney, Manville's Chief Executive, answers questions about the background of this startling development:

Q. Mr. McKinney, this announcement was a surprise. What's wrong with Manville's operations?

A. Nothing is wrong with our businesses. Filing Chapter 11 does not mean that the Company is going out of business or that its assets will be liquidated. Thousands of asbestos-health lawsuits are the problem! We're the American and world leader in a number of markets, mostly related to construction. During the current recession our sales have held up well and we've operated at better than break even (if you exclude litigation expenses). We've slimmed down too, having eliminated more than 1,500 salaried jobs in the last six months. We'll continue to generate substantial cash flow. Our Chapter 11 lawyers tell me Manville has stronger businesses and cash flow than any other big company that's ever filed.

Q. Your businesses are in good shape, but you filed under Chapter 11? Why?

A. We're overwhelmed by 16,500 lawsuits related to the health effects of asbestos, with many more projected. The federal government has refused to admit its responsibility to its shipyard workers. Congress has failed to act to provide compensation for claimants. Chapter 11 is the only orderly way for the Company to handle the litigation and treat everybody fairly. You may have read recently that another publicly held asbestos manufacturer has taken the same step.

Q. Could you have avoided Chapter 11?

A. No. To avoid Chapter 11, we would have had to strangle the Company slowly, by deferring maintenance and postponing capital expenditures. We would also have had to cannibalize our good businesses just to keep going. If recent trends had continued we would have had to mortgage our plants and properties and new credit would be most difficult and expensive to obtain. This is no way to go forward. Chapter 11 avoids these problems and preserves our operations.

Q. Will Manville go out of business?

A. No. Our business will keep operating, very smoothly, we believe.

Q. Will any of your 25,000 employees lose their jobs?

A. I don't think Chapter 11 will cause a single employee to lose a job, pay or benefits. In fact, we believe Chapter 11 is the best way to permit the Company to operate normally, providing jobs and useful products, despite all the litigation. Most important, I want to keep our employees' morale up. They've done a bang-up job to keep Manville lean and competitive.

Q. Can you pay your suppliers?

A. We don't expect any significant problem in making full, timely payment for new shipments after our filing.

Q. What effect will Chapter 11 have on your customers?

A. None. We will continue to manufacture and ship high-quality products and provide the same services, as always.

Q. What will happen to the lawsuits?

A. The Chapter 11 filing automatically stops all lawsuits pending against us. New lawsuits are also automatically stopped. We hope to establish an effective system to handle these claims in Chapter 11.

Q. What are all these lawsuits really about?

A. It's a long story. Here's the bottom line. Not until 1964 was it known that excessive exposure to asbestos fiber released from asbestos-containing insulation products can sometimes cause certain lung diseases. Since the mid-'70s, lawsuits have been brought against Johns-Manville, our subsidiary, on behalf of nearly 20,000 people alleging injury from excessive asbestos exposure. We have disposed of about 3,500 of these cases by settlement or trial. In a significant number of cases tried, juries have found that we were not at fault and acted responsibly in light of then-existing medical knowledge. Nevertheless, new lawsuits have been coming in at a rate of 500 a month—every month in the absence of Congressional action, the board of directors concluded there is no conceivable resolution to this burden, other than Chapter 11. Just to put it in perspective, Newsweek has stated that asbestos health litigation surpasses in size all the automobile accident suits pending across the nation before no-fault insurance laws were adopted.

Q. 20,000 plaintiffs? 6,000 new ones a year? Where are these suits coming from?

A. Well, many of them come from workers in shipyards and industries which used our asbestos fiber and products. Decades can pass between excessive exposure to asbestos and onset of the disease. For instance, there was asbestos insulation on the steam pipes and boilers in most ships built or refitted during World War II. The largest group suing us now consists of shipyard workers claiming recently manifested injury from asbestos exposure during wartime service, 40 years ago.

Q. What about your insurance? Shouldn't the insurance companies take care of the problem?

A. Over the years, Johns-Manville Corporation's former insurance broker bought insurance coverage for it totalling hundreds of millions of dollars. Right now, however, only one company is paying, and it pays only a small part of each claim.

Q. Why is that?

A. The whole subject disgusts me. Now, when we need the coverage, with one exception, the insurance companies are reneging. We sued them all in California in early 1980 to force payment. You won't believe it, but even now, 30 months later, we still aren't sure which judge will preside over the case. As a result the case has gone nowhere. As much as anything else, the bad faith of insurance companies has made it necessary for us to take this action. I have instructed that our damage claims in the California case be increased by five billion dollars to partially compensate creditor and shareholders for their losses.

Q. How much do the asbestos lawsuits cost you?

A. Including our outside legal fees, the cost is currently over $40,000 per case. This is sharply higher than our averages in prior years. Internal legal staff costs are also substantial.

Q. If all 16,500 lawsuits now pending cost $40,000 apiece to settle, that would total $660 million. Without payments from your insurance companies, your problem is obvious.

A. Right. And that doesn't take into account the cases yet to be filed. Talking about legal costs, one of the truly outrageous aspects of this situation is the amount of money being poured down the drain in litigation expenses and contingent fees paid to plaintiff's lawyers. Our best guess is that the injured worker receives less than a third of the total cost of these suits. The court system, with separate individual trials, is too inefficient and haphazard for a massive problem like this. We need an effective, practical national system which delivers maximum payments to injured workers, minimizes the costs of delivering those payments and withholds payments to those with no disability.

Q. What do you mean by haphazard?

A. There is no better world to describe our experience to date in the litigation. We had one suit from a plaintiff with doubtful asbestosis who had retired on a full disability pension with a broken ankle. He received an additional award for asbestos disease of one and a quarter million dollars. We have seen others totally disabled or in fact dead who received no award from the jury. In one recent trial in Texas, five separate juries hearing five different cases were empaneled and heard the same evidence before the same judge in the same courtroom at the same time. Their findings ranged from no liability to punitive awards. Maybe haphazard is too weak a description. This type of toxic tort litigation is an intolerable gambling excercise for both plaintiff and defendant.

Q. Why did you file now?

A. We're a public company. We are required to comply with certain accounting requirements. Under these rules, we're supposed to estimate the costs of current and probable litigation whenever possible and create a reserve for the liability in an amount equal to the estimate. When the asbestos cases began to proliferate, we couldn't estimate their probable number or costs, and our auditors qualified their opinion about our financial statements. When we found that the number of new cases was not declining and our "data base" of pending cases was large enough to assist in making projections, we hired epidemiologists and professionals to develop an estimate of probable future disease cases. Early this month, they finished their work. On the basis of their work so far, we forecast that we could get at least 32,000 more lawsuits on top of the 20,000 already asserted. Some people outside Manville have estimated many more claims than that.

Q. A total of 52,000 lawsuits at a cost of $40,000 apiece could mean a total cost of two billion dollars and that doesn't include an inflation factor. Could Manville afford it?

A. Not on our own. Our businesses are strong and viable but they might now be able to pay a bill that big. Even if we could pay, without the protection of Chapter 11, it would cripple us. The cost of handling paperwork for this number of cases is staggering. We have to incur that cost in all events and sometimes we are pressured by the courts to pay settlements without court determination that disability exists. We also might have to sell good businesses to raise cash. In Chapter 11, we can keep those businesses going and use their earnings to pay our liabilities. And timing is of course a problem. We have limited control over the timing of lawsuits and little ability to match timing of litigation against payments against available cash. Disregarding the litigation, we are a low-debt company with a book net worth of $1.1 billion. When a reserve is booked, net worth must also be reduced. The booking of a large reserve now for current and future asbestos-health liabilities would wipe out most of our net worth. Without showing a good-sized net worth on our balance sheet, affordable credit would have dried up, and we simply could not have operated. So, when our board of directors learned this month of the probable need for a large reserve, it considered the options and concluded we had to file for relief under Chapter 11.

Q. How do you feel about this?

A. Awful. I've never had to do anything I hated more. Our loyal suppliers, lenders and shareholders all may suffer for their credit and investment exposure before our Chapter 11 filing. Losses could be very, very large for our present shareholders. Then, too, the many people who do have disabling injuries from excessive exposure to asbestos will be hurt. Their claims will be delayed and reduced. Still, it seems to us that the only orderly way to treat everybody fairly is through a court-supervised Chapter 11 proceeding.

Q. Disabled workers are fully protected by workers' compensation. How is it most people think they can sue you?

A. You're partly right. Workers' compensation covers an employer's liability to its employees for injury in the workplace. The law has been interpreted to make "employer" and "employee" very restrictive terms. This means that a 1940's employee of a shipyard can get workers' compensation from the shipyard, but he can also sue us for having supplied the allegedly defective product. I don't agree with that, but the fact is we are being sued in virtually every state because of it.

Q. Isn't there some other national program for people injured while on the job?

A. There are programs in other industries, but not for asbestos workers. There should be a statutory compensation program for asbestos injuries. We've tried to get a program passed, but Congress has been preoccupied. This is another reason we've been forced into Chapter 11. No other country uses the court litigation system to provide compensation for occupational disease.

Q. How long will you be in Chapter 11?

A. That depends. I've ordered our lawyers to go full blast. One of the biggest problems will be court approval of the estimated amount due in the future to product-liability claimants. Once we get that approval, I think that getting out of Chapter 11 ought to be just a matter of finishing up the legal proceedings. In the meantime, I understand that a company in Chapter 11 is allowed to conduct its affairs in the ordinary course of business without court approval.

One other thing needs attention. Our lawyers tell me that Congress needs to act by October 4 to straighten out an important technical point of bankruptcy court jurisdiction. Important aspects of our Chapter 11 case could be stalled until we get new legislation. I hope Congress will resolve this important technical problem quickly and also move toward a resolution of occupational disease litigation so that the thousands of citizens and voters caught up in the problem will be spared the expensive, inefficient and haphazard litigation system we have been saddled with. I also hope the government will step up to its responsibilities for having played a role in creating the disease problem.

Q. Is there anything else to know?

A. Yes. You should know that I and the people who work for the Company have turned every stone at least once seeking an out-of-court solution to this problem. Chapter 11 hurts, yes. However, our board believes Chapter 11 is the best way to protect our businesses. We expect to emerge from Chapter 11 stronger than ever. We are determined to make the best of this for everyone involved.

No. 81-3373

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DOLORES M. MORAN, Executrix of the Estate of Edward P. Moran, Deceased, *Plaintiff-Appellee,* v. JOHNS-MANVILLE SALES CORP., *Defendant-Appellant.*	APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed October 28, 1982

Before: MARTIN, Circuit Judge, PECK and BROWN, Senior Circuit Judges.

PECK, Senior Circuit Judge. In this diversity action, Johns-Manville Sales Corp. ("JM") appeals from a judgment for the plaintiff, and from the trial court's denial of JM's motions for judgment notwithstanding the verdict ("JNOV"), for a new trial, and for a remittitur. On appeal, JM attacks the sufficiency of the evidence at trial to support the jury's award of $350,000 in compensatory and $500,000 in punitive damages. JM also offers policy arguments against any award of punitive damages in this case.

Edward Moran, the plaintiff's deceased, worked for over thirty years installing insulation. During that time he worked with asbestos insulation products made by JM's corporate predecessors. Moran died of lung cancer at age sixty-one. His executrix prosecuted this action against various manufacturers of asbestos products under a theory of strict liability in tort.

I. SUFFICIENCY OF THE EVIDENCE

Strictly speaking, this Court does not review the actions of juries. Our review of the sufficiency of the evidence is by review of a trial judge's rulings on motions for directed verdict or JNOV. In diversity cases within this Circuit, this Court resolves questions of the sufficiency of the evidence by applying the test of sufficiency under state law. *E.g., Chumbler* v. *McClure,* 505 F.2d 489, 490 (6th Cir. 1974); *Moskowitz* v. *Peariso,* 458 F.2d 240, 244 (6th Cir. 1972). Under the test in Ohio, the forum state, an issue is in the province of the jury "when there *is* sufficient evidence relating to that issue to permit reasonable minds to reach different conclusions on that issue. . . ." *E.g., O'Day* v. *Webb,* 29 Ohio St.2d 215, 215 (1972).[1] The test is not whether the trial judge would grant a new trial on the weight of the evidence. *E.g., Hamden Lodge* v. *Ohio Fuel Gas Co.,* 127 Ohio St. 469, 469 (1934).

A. Motions for Directed Verdict and JNOV

JM first argues that there was insufficient evidence that it knew or should have known of health hazards to insulation workers like Mr. Moran. JM's knowledge (or duty to discover) is relevant under the following rules governing strict product liability under Ohio law:

> "1. One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

---

[1] In Ohio, only what is stated in a syllabus or in an opinion per curiam or by the court represents a pronouncement of law by the Supreme Court. *State ex rel. Canada* v. *Phillips,* 168 Ohio St. 191, 191 (1958).

> "(a) the seller is engaged in the business of selling such a product, and
>
> "(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> "2. The rule stated above applies although the seller has exercised all possible care in the preparation and sale of his product, and the user or consumer has not bought the product from or entered into any contractual relation with the seller."
>
> *Temple* v. *Wean United, Inc.*, 50 Ohio St. 2d 317, 317 (1977) (drawing from *Restatement (Second) Torts,* § 402A).

These rules are modified in the case of unavoidably unsafe products: the Supreme Court of Ohio has refused to hold the manufacturer of a prescription drug strictly liable to a consumer when the manufacturer has provided to the medical profession adequate warnings of the dangers of the drug. See *Seley* v. *G. D. Searle & Co.*, 67 Ohio St.2d 192, 192 (1981). "A warning is adequate where, under all the circumstances, it reasonably discloses all risks inherent in the use of the drug of which the manufacturer, being held to the standards of an expert in the field, knew or should have known to exist." *Id.* syllabus 2. This adequacy is a question of fact. *Id.*

The parties both look to *Seley* for the legal principles relevant to liability in this case. Thus, they apparently agree that asbestos insulation material is an "unavoidably unsafe product," and that Ohio law would not impose strict product liability on its manufacturers unless they failed to provide the warnings required by *Seley*.

JM contends that there is insufficient evidence that it knew or should have known of the health hazards to installers of asbestos insulation before 1964, when it first began to put warning labels on that product. JM argues that the "state of the art," that is, the state of knowledge of experts in the field, was not shown by Moran to include knowledge of the health risks to workers such as himself. JM's conclusion is that Moran thus failed to show that its insulation products were "defective," even without warning labels.

We find Moran's evidence of known or knowable risks to insulation workers to be ample. By deposition testimony, the late Dr. Kenneth Smith, a former medical director at JM, testified that he was aware of the "association" between lung cancer and inhalation of asbestos fibers in the late 1940's; he further testified that he was aware of the cancer "hazard" from the inhalation of fibers by the late 1950's. Smith stated that he had recommended placing labels on asbestos-containing products as early as 1952 or 1953. In his opinion, the decision by JM not to use such labels then was purely a "business decision." Another chief witness for Moran was Dr. Joseph Wagoner, an epidemiologist. Dr. Wagoner surveyed the medical literature relating to the hazards of asbestos and concluded that by 1953 there was "well advanced information" showing a "cancer problem" in the use of asbestos-containing insulation.

Cross-examination of these witnesses tended to show that causal connections between lung cancer and use of asbestos products were not established with any certainty before JM began using warning labels. Yet, as Justice Sweeney noted in his opinion in *Seley*:

> A jury may find that a warning is inadequate and unreasonable even where the existence of a "risk," i.e., a causal relationship between use of the product and resulting injury, has not been definitely established. Thus, where scientific or medical evidence exists tending to show that a certain danger is associated with the use of the drug, the manufacturer may not ignore or discount that information in drafting its warning solely because it finds it to be unconvincing.
>
> 67 Ohio St.2d at 198 (citations omitted).

If a jury may find a warning inadequate in such circumstances, then, a fortiori, it may find the absence of a warning unreasonable. Judge Wisdom has put it very well: a duty to warn attaches, not when scientific certainty is established, but "whenever a reasonable man would want to be informed of the risk in order to decide whether to expose himself to it." *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1089 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

JM relies particularly on the "Fleischer-Drinker"[2] study, published in 1946, to rebut Moran's assertion that the state of the art embraced knowledge of health hazards to insulation workers before JM began putting warning labels on asbestos insulation. This study, conducted at U.S. Navy and government contract shipyards by three Navy officers and one member of the U.S. Maritime Commission, concluded that naval "pipe covering is not a dangerous occupation." Fleischer-Drinker at 16. Comparatively few of the workers studied by Fleischer and Drinker, however, had had long-term exposures to asbestos dust — a point made by Dr. Wagoner in his direct testimony for the plaintiff. Moreover, the authors of the study noted that if pipe coverers worked steadily at jobs producing high concentrations of asbestos dust — such as band sawing — a "considerably greater" incidence of asbestosis could be expected. Fleischer-Drinker at 16. In short, the Fleischer-Drinker study need not have been considered by the jury to epitomize the state of the art, nor to excuse JM's failure to place earlier warnings on its insulation products.

JM next argues that the evidence at trial did not support an award of punitive damages. JM states that Ohio law requires that "actual malice" — which JM apparently equates with ill-will — be established before punitive damages may be awarded. This is not the law of Ohio as stated by the Ohio Supreme Court or as construed by this Court. The

---

[2] Fleischer, Viles, Gade & Drinker, *A Health Survey of Pipe Covering Operations in Constructing Naval Vessels*, 28 J. Indus. Hygiene & Toxicology 9 (1946).

Ohio Supreme Court recently summarized the "malice" justifying puntive damages thus:

> Evidence of actual malice . . . must be present before a jury question of punitive damages is raised; actual malice may take either the form of the defendant's express ill will, hatred or spirit of revenge, or the form of reckless, willful or wanton behavior which can be inferred from surrounding circumstances.
>
> Detling v. Chockley, 70 Ohio St.2d 134, 137-38 (1982) (per curiam). *Accord,* Drayton v. Jiffee Chem. Corp., 591 F.2d 352, 365-66 (6th Cir. 1978); Gillham v. Admiral Corp., 523 F.2d 102, 108 (6th Cir. 1975) (applying Ohio law).

In the product liability action of *Leichtamer* v. *American Motors Corp.*, 67 Ohio St.2d 456, 456 at syllabus 2 (1981), the Ohio Supreme Court held that "[p]unitive damages may be awarded where a manufacturer's testing and examination procedures are so inadequate as to manifest a flagrant indifference to the probability that the product might expose consumers to unreasonable risks of harm." By analogy to *Leichtamer* we hold that a jury question of punitive damages was established if a reasonable juror could have concluded that JM's failure to place warning labels on insulation products before 1964 manifested such a "flagrant indifference" to users' risks of harm.

To rebut Moran's evidence of flagrant indifference to risks to insulation workers, JM argues that the record discloses that the Selikoff study of 1964[3] was the first to document health risks to *users*, rather than *producers*, of asbestos products. This assertion is belied by the summary of prior knowledge given in the Selikoff study itself:

---

[3] Selikoff, Churg & Hammond, *The Occurrence of Asbestosis Among Insulation Workers in the United States*, 132 Ann. N.Y. Acad. Sci. 139 (1965).

> Ellman in 1934 mentioned a case of asbestosis in an insulation worker. Other cases were subsequently reported, and in the annual report of the Chief Inspector of Factories for the year 1956, "lagging," or insulation work, was recognized as hazardous. Similarly, Hervieux in France drew attention in 1962 to the dangers of such end product use as insulation work. The only large scale survey of asbestos insulation workers was undertaken in the U. S. by Fleischer *et al.* in 1945. They found only three cases of asbestosis and concluded that "asbestos pipe covering of naval vessels is a relatively safe operation." Unfortunately, 95 per cent of those examined by them had worked for less than 10 years at the trade and, as we shall see, evaluation of the risk of insulation workers limited to study of men with relatively short durations of exposure may be misleading.
>
> Selikoff at 140 (footnotes omitted).

In judging whether a manufacturer's indifference to consumers' risks is "flagrant" we believe a jury may weigh the gravity of the harms threatened against the onerousness of the manufacturer's correctives. Here the harms threatened were chronic debilitating diseases; the corrective was the placement of warning labels on insulation products so that insulation workers might try to protect themselves if they so chose. Under the limited standard of review we may employ, we cannot disturb the jury's award of punitive damages in this case.

We stress that we now hold only that a reasonable jury could have decided this case on this evidence as this jury did. We do not hold that every jury presented with the same evidence would be constrained to reach the same results. See *Migues* v. *Fibreboard Corp.*, 662 F.2d 1182, 1189 (5th Cir. 1981).

B. New Trial Motion

JM moved not only for a JNOV, but, in the alternative, for a new trial.[*] On a new trial motion, unlike on a motion for JNOV, the trial court may weigh the evidence. *E.g., TCP Indus., Inc.* v. *Uniroyal, Inc.*, 661 F.2d 542, 546 (6th Cir. 1981). The decision to grant or deny a new trial is one "confided almost entirely to the exercise of discretion on the part of the trial court." *E.g., Allied Chem. Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36 (1980); *accord, TCP Indus., supra*, 661 F.2d at 546 (citing cases). In light of the substantial evidence supporting the jury verdict, which we have summarized above, we can find no abuse of discretion in the denial of JM's motion for a new trial.

II. POLICY ARGUMENTS AGAINST PUNITIVE DAMAGES AWARD

JM offers numerous reasons why an award of punitive damages would be inappropriate in this case. The first is that the goals of punishment and deterrence would not be served by awarding "punitive" damages. JM argues that "there is no conduct to deter because Johns-Manville modified its products in the 1960's." In Ohio, however, the deterrence sought by punitive damages is general, not specific: the offending party is set up "as an example *to others* that they might be deterred from *similar* conduct." *Detling, supra*, 70 Ohio St.2d at 136 (emphasis added); see also 30 OJur 3d, *Damages*, § 148 (citing cases). Whether a defendant's particular course of conduct has ceased is irrelevant to the accomplishment of this broader purpose.

In *Drayton* v. *Jiffee Chem. Corp.*, 591 F.2d 352, 365-66 (6th Cir. 1978), we affirmed a district court's refusal to award punitive damages in a product liability case. The trial court had noted both "improving industry practices, and a change in corporate ownership, as weighing against such an award. See 395 F. Supp. 1081, 1097-98 (N.D. Ohio 1975).

The trial court's action may be questioned in light of later Ohio precedent; moreover, our own affirmance, by a divided court, was lukewarm. See 591 F.2d at 365-66, 371-74. *Drayton* was a case tried to the bench, and it was key to this Court's affirmance that "the trial judge's decision not to award punitive damages was based upon considerations of both law and fact." *Id.* at 365. We also noted the trial judge's *factual* characterization of the plaintiffs' arguments for punitive damages as "'more shrill than persuasive'." *Id.* at 366. Finally, we invoked Rule 52(a), Fed. R. Civ. Pro., a pellucid indication that a *factual* determination was being left undisturbed. See 591 F.2d at 366. Nothing we said in *Drayton* requires us to disallow punitive damages in this case.

JM contends that no culpable party would be punished by an award of "punitive" damages here. It points out that the persons responsible for the business decisions giving rise to JM's liability have long ago left JM's employ. We noted in *Gillham* that, under Ohio law, a corporation may be "subjected to punitive damages for the tortious acts of its agents within the scope of their employment in any case where a natural person acting for himself would be liable for punitive damages." 523 F.2d at 108. JM would have us overlook the liability of the legal person. We decline to adopt the boundless principle that legal entities may escape liability for punitive damages if the "culpable" persons are no longer agents of the corporation. It is agency at the time of the tortious act, not at the time of litigation, that determines the corporation's liability. JM's rule would make the corporate veil an impenetrable shield against punitive damages; JM points to nothing in Ohio law from which such a shield could be fashioned.

We are not dissuaded from allowing punitive damages because this cost will ultimately be borne by "innocent" shareholders. Punitive damage awards are a risk that accompanies investment. *Shimman* v. *Frank*, 625 F.2d 80 (6th Cir. 1980) did not establish a contrary rule. In that case we reduced, but did not eliminate, an award of punitive damages against a union; we noted that "the ones who will end up paying for the punitive damages award are the union members. For this reason, courts should be slow to award huge punitive damages awards against unions." *Id.* at 103 (fn. omitted). The case of a union member and shareholder are, however, not wholly analogous. Individual workers only seldom can choose which union to belong to; a group of workers cannot change bargaining agents overnight. Investors may typically place their money where they choose and withdraw it when they wish. The prospect of ultimate liability for punitive damages may encourage investors to entrust their capital to the most responsible concerns.

JM urges with particular force that punitive damages should not be awarded against a company that faces a multitude of product liability actions. If punitive damages are awarded in many of these actions, JM argues that it will not be punished, but destroyed. We have read Judge Friendly's interesting essay on such a prospect, and its implications for the law, in *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 838-41 (2d Cir. 1967). However eloquent the essay, it is confessed dictum. Judge Friendly noted that "the New York cases afford no basis for our predicting that the [New York] Court of Appeals would adopt a rule disallowing punitive damages in a case such as this, and the *Erie* doctrine wisely prevents our engaging in such extensive law-making on local tort liability, a subject which the people of New York have entrusted to their legislature and, within limits, to their own courts, not to us." *Id.* at 841. So it is here. The relief sought by JM may be more properly granted by the state or federal legislature than by this Court. Such legislative relief is even now being sought by asbestos-product manufacturers. See 68 A.B.A.J. 398 (April 1982); New York Times, Aug. 10, 1982, at 34.

III. TRIAL ERROR

JM raises only one supposed trial error — allowing the court reporter to reread to the jury, on its request after retiring, the deposition testimony of Dr. Smith. The decision whether to allow rereading of testimony is one that "lies almost exclusively in the good judgment of the judge presiding." *United States* v. *DePalma*, 414 F.2d 394, 396 (9th Cir. 1969), *cert. denied*, 396 U.S. 1046 (1970). The trial court did not abuse this wide discretion: the first reading of the deposition came long before the case was sent to the jury; further, it had been read into the record by two lawyers, and, as the district court noted, such evidence does not make the same lasting impression as a live witness.

On this point, JM's citation of *Henry* v. *United States*, 204 F.2d 817 (6th Cir. 1953), is inapt. In that case mechanically recorded testimony was replayed for the jury, but the jury was also favored with a rehearing of the trial judge's earlier castigation of a witness as untruthful. There was no judicial comment on the weight or trustworthiness of the testimony reread in this case.

The judgment of the district court is affirmed. Costs to appellee.

LAW OFFICES
BASKIN AND SEARS, P. C.
818 CONNECTICUT AVENUE, N. W.
WASHINGTON, D. C. 20006
(202) 331-3700
TELEX: BASKIN WSH 904149

FLORIDA
MARYLAND
NEW YORK
PENNSYLVANIA
VIRGINIA
WASHINGTON, D. C.

MEMBER
INTERJURIST, LTD.
GENEVA, SWITZERLAND

November 30, 1982

The Honorable Robert Dole
Chairman, Subcommittee on Courts
Committee on the Judiciary
United States Senate
Washington, D.C.

Dear Senator:

During the Subcommittee's hearing on November 9, you invited the various groups which presented testimony to submit their views on the question of a "super fund" to compensate the victims of asbestos-related disease.

The Asbestos Litigation Group, an association of attorneys which represents approximately ninety percent of the some 16,000 individuals whose personal injury and wrongful death claims pending before the courts were interrupted by the Manville Corporation's attempt to claim bankruptcy, is pleased to respond.

The Asbestos Litigation Group is prepared to discuss and consider any reasonable system that promises to adequately compensate the victims of asbestos-related disease.

We do not know what is contemplated by those who suggest a "super fund." We believe the duty to define such a system rightfully falls on those who, like the Manville Corporation, dispute the well-established principle of American jurisprudence that the exercise of an individual's constitutional right to a trial by jury of a personal injury and wrongful death claim is the most effective and fair method of resolution. This system, which has been carefully developed by the courts over several generations and which has served society and individuals well in a variety of contexts, including that of industrial injury, should not be lightly discarded on the grounds that we are somehow confronted suddenly with a "novel" situation. The danger that further "novel" situations involving other toxic products will require additional "super funds" to be created may embroil Congress for years in trying to craft alternatives to the judicial system of resolving tort claims.

We look forward to learning from the proponents of a "super fund" the exact nature of their proposal. If such a system is to be fair and effective, we believe the following fundamental criteria must be incorporated:

-- First, the system must be voluntary. Asbestos victims must not be stripped of their constitutional right to a trial by jury of their personal injury and wrongful death claims. Asbestos victims may elect to voluntarily relinquish this right in favor of participating in an alternative compensation system, but that choice must be one for the individual to make.

-- Second, the system must provide for full and adequate compensation on an individual basis. There are vast differences among individual cases. Any attempt to "average" these or to reduce them to a least common denominator will do grave injustice to victims who have suffered severe and painful sickness or whose death has deprived their family of not only a source of income but of a unique individual.

-- Third, the system must provide for speedy resolution of claims and prompt payment. It is not the victims who are responsible for the "delays" that Manville complains of in the judicial system. The interest of the victims is to move as swiftly in the courts as possible -- to pay medical and hospital bills, to provide for themselves and their families, and to be free of the burden of litigation before death or disability takes its full toll. Delay and the oft-mentioned "enormous defense costs" are, we submit, the fault of those, like Manville, who deny liability and seek to avoid payment. Any new system will have to insure that the present delays are not replaced by simply a new form of procrastination.

-- Fourth, the American taxpayer should not be called upon to contribute to a "super fund" system by which those responsible for the injuries and deaths brought on by asbestos make compensation to the victims. This would amount to a bail-out of the manufacturers and their insurance companies at taxpayer expense. We see no reason why such a bail-out is necessary or appropriate and we believe that it is not only unrealistic in the economic condition facing the federal budget today and in the years ahead, but is also contrary to the sound legal principle that the wrongdoer is responsible for the damage his wrong has caused.

-- Fifth, an essential precondition for any discussion of a "super fund" is the dismissal of Manville's bankruptcy action. Until that occurs, Manville, shielded from the financial consequences of its asbestos involvement, will have little incentive to negotiate a fair compensation system. Without Manville being removed from the bankruptcy process, unequal bargaining positions would be created between, on the one hand, the victims and the defendants who have not sought refuge in bankruptcy and, on the other hand, Manville. The victims would have to negotiate while they are pressed with the costs of their disease. The other defendants would have to negotiate while facing continuing liability. Only Manville would be free to negotiate without such pressures from behind the protective cloak of the bankruptcy court. This is manifestly unfair. Thus, we believe the first step in any consideration of a "super fund" be that Manville be placed on the same footing with other parties by the termination of its bankruptcy proceeding.

Respectfully submitted,

John P Sears

John P. Sears

TESTIMONY OF JUDY GENTILE

My name is Judy Gentile. I am the daughter of John Manti. This is my mother, Jean Manti. We are here today to tell you about my father who was an insulator and worked with asbestos for 27 years.

In January 1980, he began to have repeated colds and pneumonia. In April, he went to Johns Hopkins Hospital for his yearly lung check-up and x-ray. That week he was called back and admitted because the x-ray was suspicious. After additional tests, my dad was told he had lung cancer. Without an operation he would have about 18 months to live.

In May, he underwent surgery and it was worse that the doctor had expected. He lost the entire right lung. It was after this operation that the doctor told us there were asbestos fibers in his cancered lung. Things got worse and during the next 70 days he underwent several operations.

One was for a fistula (a hole or canal that will not close leading to another organ) which was at the end of his bronchial tube. Another removed most of his ribs on that side and left a cavity your fist could fit into. This cavity needed to be irrigated and packed, using kelly clamps and 4-inch kling, two to three times a day.

When my dad's insurance ran out, he had to leave the hospital and was admitted to Veterans Hospital. It was at this point that my sister, Linda Carper, and I became my dad's full-time nurses. The hospital was so understaffed that we left our families and business to take turns around-the-clock. My mother was taught how to irrigate and pack the cavity because we didn't have the money for qualified help. I also had to learn in case my mother got sick. After three weeks of caring for him at the Veterans Hospital, we took him home and continued his care there. After all, we were doing everything and at home it was easier on both my mother and father.

In February 1981, my dad was readmitted to Johns Hopkins for the removal of the remaining ribs. This operation was canceled, due to the fact that the cancer had metastasized (a malignant growth that spreads from one part of the body to another) to his leg, fracturing his bone. He started chemotherapy and radiation treatments, which required taking him to and from the hospital several times a week. Because we couldn't afford an ambulance, we had to carry him up and down the steps and put him in the car ourselves. This was extremely painful for my father. After he couldn't bear the pain any longer, we had to borrow money, so we could get a porta-van to pick him up. This was $55 each day.

In September 1981, he entered the Oncology Department of Johns Hopkins and had another operation. This was on his fractured leg. A steel rod was implanted down the center of the bone. He spent approximately one and a half to two weeks in the hospital, then returned home.

During this sixteen-month period, we waited for some word on my father's workmen's compensation hearings. The first hearing was not until March 31, 1981, over nine months after it was filed. There were several hearings during this time, because the Medical Board only meets once a week for only two hours. Two hours is hardly enough time to call one witness, let alone settle a claim of this magnitude. So, we had to keep reappearing at these two-hour hearings. There seemed to be no end in sight, so we wrote to Governor Hughes and pleaded with him to personally step in and push for a speedier hearing.

After sixteen months, my dad was awarded a 100 percent work-related disability. On November 10, 1981, he received his first workmen's compensation benefits check. On November 19, 1981, nine days later, he died. It had been eighteen months since his first operation. At the present time, we are suing 12 insulation manufacturers. We have settled with one company, Owens-Corning Fiberglass.

There are several appeals on my dad's case to overturn the Board's decision, and now they are taking his case to the Supreme Bench of the Superior Court on September 22, 1982.

We are testifying here today because we want to share a little bit of the pain that we went through. Johns-Manville let people get exposed to a substance that they knew could kill and disable them, and yet did not take any safety precautions.

We believe that if unjust laws allow companies like Johns-Manville to deliberately kill and disable people, it will be the working people who will continue to pay with our lives and our taxes. It's the taxpayer who is footing the bill for a company that knew what it was doing. If John-Manville is allowed to go bankrupt and doesn't meet its responsibilities, innocent victims are going to have to go on welfare, Medicare, and other social services.

Johns-Manville should be held responsible for what they have done to people's lives -- for what they have done to my father and our family. They shouldn't be allowed to get away with it. I, for one, believe, that criminal charges should be placed against them. They knew what they were doing. It's like murder. It is just the same as if I took everyone in this room and deliberately turned the gas heater on without the flame and asphyxiated everyone on purpose. I would know what I was doing, and its the same for Manville.

If the bankruptcy laws allow Johns-Manville to get away with the deliberate destruction of human and family life, then we might as well take every health and safety law we have and throw it out.

We want to state clearly that what we are doing here today is not for ourselves. My father is gone and nothing is going to bring him back. My father sat at the dinner table on Easter Sunday, seven months before he died and said to my sister, our husbands and my mother, "I want you to promise me one thing. I don't want to hear that you are doing this for blood money. I want you to get out there and fight. This is my life and I worked for my family and my children. I want you to go out there and fight not only for me but for other people so that they don't have to go through what we did."

We are a close family, and we honestly believe that if we don't get out and do this for other people, that his death will be for nothing. And we are committed to making sure he did not die in vain. We ask this committee, if Johns-Manville is successful in protecting its assets from the people it injured and killed and continues "business as usual," then for what purpose did my father die.

My mother's life -- after nearly 39 years of marriage to a wonderful and gentle man who put her and our family above everything else -- is not "business as usual." How do we put our lives back together again? How do we live with the knowledge that corporate officers decided to hide the truth and adopt policies that resulted in my father's death?

All we want is justice. There is no real compensation. There is no real comfort. But you tell me, Mr. Chairman, how do we sleep at night when we think of my father and all he suffered and we know that one of his murderers is allowed to use a law to get out of their responsibility?

Senator **Dole**. Our next witness is Mr. James Fite of the White Lung Association. Mr. Fite, you may proceed. Your entire statement will be made a part of the record. We are going to have to limit you to 5 minutes because we have a number of witnesses and I have to be making a speech at noon somewhere. It is not particularly good, but I have to give it anyway. [Laughter.]

STATEMENT OF JAMES FRANKLIN FITE, EASTERN REGIONAL DIRECTOR, WHITE LUNG ASSOCIATION

Mr. **Fite**. Thank you, Senator. My name is James Franklin Fite. I reside at 3030 Barclay Street in Baltimore, Md. I am the program organizer for the Maryland Committee for Occupational Safety and Health, the eastern regional director of the White Lung Association, and am one of the representatives of that association on the board of directors of the National Breath of Life Organizing Campaign.

I was exposed to large amounts of airborne asbestos while employed as a carpenter and while further employed as an outside machinist for the Bethlehem Key Highway Shipyard in Baltimore. I appreciate being able to express to you the views of thousands of asbestos victims who belong to our organization.

I am going to change my remarks somewhat from the written record, at Mr. Velde's suggestion, in order to shorten. I must confess that I can only express our position in two seemingly contradictory viewpoints. On one hand, the breakdown of the compensation systems has forced us to turn to civil court. On the other hand, we cannot say that these third-party claims are satisfying our needs.

The chapter 11 filing by the Manville Corp. makes it even more remote that the courts will solve our problems. The chapter 11 action, if upheld, will attest to the failure of the legal system to respond to the public health crisis that is caused by asbestos exposure.

And throughout these points, I might add, there are many points that are just as true for cotton dust, coal dust, chemical carcinogens, and other toxins found in the workplace.

The various workers' compensation systems were developed to rid the courts of civil suits resulting from job-related injury and disease. None of these systems respond adequately to the problem of occupational injury. But with respect to occupational disease, the systems are a dismal failure.

New York State has nearly 10 percent of this country's population. Yet, between the years 1966 and 1978, an average of five people per year were compensated for occupationally caused cancer. This was during the same time that the National Institute of Occupational Safety and Health estimated 100,000 deaths a year from occupational disease.

Dr. Selikoff's recent study of disability compensation for asbestos-associated disease in the United States confirms these inequities. Dr. Selikoff's research represents a grouping of workers who are most likely to gain compensation for their disease. They were unionized; they were studied. They had some of the earliest detection and education programs, and for these reasons they gained more compensation more quickly than the average victim.

I would like to submit pages from the summary of that report, but basically Dr. Selikoff says that only 15 percent of the victims received compensation. [See exhibit 1 on p. 117.]

What is unclear in the current research and studies is the amount of disease which goes unnoticed and uncompensated by the asbestos industry or the commercial and public users. We are all aware that the victim pays, but what is at stake is how much is society willing to pay.

Some indications of this are included in the 1980 report to Congress from the Labor Department on occupational disease. I would like to submit pages from the summary of that report, but basically the essence of that report is that the majority of occupational disease victims gain their livelihood from social security or welfare. [See exhibit 2 on p. 123.]

Certainly, we have no intention of giving up our rights to legal action through the civil courts. Our position is that we should concede nothing else. The reasons and feelings of the Brown Lung Association, the Black Lung Association, and the White Lung Association, on these matters were expressed in resolutions from their recent Congress of Disabled Workers held in Durham, N.C., in September. I would like to submit these for the record. [See exhibit 3 on p. 129.]

The real problem this subcommittee and Congress will face is not which court will handle the planned development of public health, but whether or not the court system can respond to this public health crisis. Nonetheless, we cannot sacrifice any of our present legal rights.

The Manville action further testifies to a public health failure. Yet, they cannot, in our opinion, be allowed to escape both the laws of public health and those of liability. There are several major questions which should be decided before this question that we are speaking about today can be resolved.

These include: When can we stop using asbestos altogether? What amount of compensation, if any, should be paid to those who have invested money in the asbestos industry? What are the bases for criminal charges against executives of the asbestos industry? What amount of the asbestos industry's assets must be acquired before the immediate compensation of victims becomes possible? What amount of the asbestos industry's assets must be required to remove asbestos from society?

The answers to these questions can only come from a commission which we are suggesting, which represents the different victims of asbestos, from the lung cancer victims to the public school principals. This commission should report back to Congress by February 1, 1983, and should have complete autonomy from industry.

Thank you.

Senator DOLE. Thank you very much, and we will review the material you have submitted for the record, and if it is not too voluminous, it will be made part of the record. Otherwise, we will summarize it.

Mr. FITE. It is merely the summaries of those statements.

Senator DOLE. Thank you, Mr. Fite.

[The prepared statement and exhibits submitted by Mr. Fite follow:]

PREPARED STATEMENT OF JAMES FRANKLIN FITE

My name is James Franklin Fite. I reside at 3030 Barclay St., Baltimore, Md. I am the program organizer for the Maryland Committee on Occupational Safety and Health, the Eastern Regional Director of the White Lung Association and am one of the representatives of that association on the board of directors of the Breath of Life Organizing Campaign, Inc.

I was exposed to large amounts of airborne asbestos while employed as a carpenter and while further employed as an outside machinist for the Bethlehem Key Highway Shipyard. I appreciate being able to express to you the views of thousands of asbestos victims who belong to our organization.

Today we are not going to speak directly to the many points of law which your committee is studying. Instead we wish to discuss the failure of the legal system to respond to the public health crisis caused by asbestos exposure. Throughout these remarks there will be many points that are just as true for cotton dust, coal dust, chemical carcinogens, etc. This is because the problem we are addressing in this committee is the admitted inability of the court system to solve this crisis.

The various worker's compensation system were developed to rid the courts of civil suits resulting from job-related injury and disease. None of these systems respond adequately to the problem of occupational injury, but with respect to occupational disease, the systems Social Implications of the Manville Bankruptcy Filing are a dismal failure. New York State has nearly 10 percent of this country's population, yet between the years of 1966 and 1978 an average of five people a year were compensated for occupationally caused cancer. The National Institute on Occupational Safety and Health estimates 100,000 deaths from occupational disease per year.

Dr. Selikoff's recent study of Disability Compensation for Asbestos-associated Disease in the United States confirms these inequities. Dr. Selikoff's research represents that grouping of workers who were most likely to gain compensation for their disease. They were unionized, they were studied, they had some of the earliest detection and education programs and for these reasons they gained more compensation, more quickly than the average victim. Here I would like to submit pages from the summary of that report.

What is unclear in the current research and studies is the amount of disease which goes unnoticed and uncompensated by the asbestos industry or the commercial and public users. We are all aware that the victim pays, but what is at stake is how much society is willing to pay. Some indications of this are included in a 1980 Report to the Congress from the Labor Department. Here I would like to submit pages from the summary of that report.

Certainly we have no intention of giving up our rights to legal action through the civil courts. Our position is that we should concede nothing else. This is why the Breath of Life Organizing Campaign has singled out the defense of the cotton dust standard and opposition to H.R. 6181 as the main educational activities to be undertaken during November. The cotton dust standard is a public health regulation which is not strong enough to eliminate disease, to reduce it will mean more victims. As the submitted documents show the main economic support of occupational disease victims, including asbestos victims, is social security. H.R. 6181 merely allows the Social Security Administration to more rapidly continue its program to drive disabled workers from their only means of support.

The reasons and feelings of the Brown Lung Association, the Black Lung Association, and the White Lung Association on these matters are expressed in the resolutions from their recent Congress of Disabled Workers, held in Durham, N.C., in September. I would like to submit these for the record.

The real problem this subcommittee and the Congress face is not which court will handle the planned development of public health systems of prevention and compensation. Nonetheless, we cannot sacrifice any of our present legal rights. The Manville action further testifies to the public health failure, yet they cannot escape the laws of public health and liability.

There are several major questions which should be decided before this question can be resolved.

These include: When can we stop using asbestos altogether? What amount of compensation, if any, should be paid to those who have invested money in the asbestos industry? Are there basis for criminal charges against the executives of the asbestos industry? What amount of the asbestos industry's assets must be acquired before the immediate compensation of victims becomes possible? What amount of the asbestos industries assets must be acquired to remove asbestos from society?

The answers to these questions can only come from a commission which represents the different victims of asbestos, from lung cancer victims to public school principles. This commission should report back to the Congress by February 1, 1983, and should have complete autonomy from the industry.

Thank you.

EXHIBIT 1

DISABILITY COMPENSATION
FOR ASBESTOS-ASSOCIATED DISEASE IN U.S.

(by Dr. I. Selikoff)

(From Summary)

Report to Department of Labor

Contract # J-9-M-8-0165

Workers' compensation for occupational asbestos disability and death

Disability. Among the 995 asbestos insulation worker deaths that were studied, the average period of disability prior to death from an asbestos-associated disease was 20.5 months. However, the length of disability varied considerably with the specific illness. Workers who died from mesothelioma were disabled for less than one year while those who died of asbestosis were disabled for three and one-half years. Disability due to lung cancer averaged about a year and a half before death.

Three out of every ten disabled asbestos workers applied for workers' compensation disability benefits. The proportion of workers filing disability claims approached 50% in cases of long-term disability (greater than one year). However, the likelihood of a worker receiving a workers' compensation award before his death was not high. Slightly more than half of those asbestos insulators disabled more than one year who had filed workers' compensation claims received benefits before their deaths. Overall about 15% of all disabled asbestos workers received workers' compensation benefits prior to their death.

Many workers disabled from asbestos-associated disease received either old-age or disability insurance benefits from Social Security during some part of their terminal illness. The importance of these benefits was most evident to those whose disability lasted more than 12 months. For those disabled 12-23 months, 24-35 months, or 3 years or more, the proportion receiving Social Security benefits rose to 66%, 77% and 83% respectively. Few of the disabled asbestos insulation workers (less than 15%) received benefits from both Social Security and Workers' Compensation during their terminal illness.

Mortality. The average age at death from asbestos-associated disease among nearly 1,000 asbestos insulators studied was 61.8 years. Of those who died of mesothelioma, the average age at death was 60 years; those who died of lung cancer were slightly older (61.6 years). The average age at death from asbestosis was 65, usually after a significant period of disability.

Some reference to asbestos or asbestosis was made on 21% of the death certificates of the workers whose cause of death was related to asbestos. The presence of this information on the death certificate was highly skewed by cause of death, with 92% of the deaths from asbestosis being so noted on the death certificates, in 20% of the deaths from mesothelioma and lung cancer and much less commonly in deaths from other asbestos-associated neoplasms. Where autopsies were performed, there was little increase in the likelihood that asbestos would be mentioned on the death certificate, perhaps in part because the death certificate is generally prepared before the results of the autopsy are known. Mention of asbestos on the death certificate increased the likelihood that survivors knew of the relationship between asbestos exposure and the workers' illness. However, the majority (74%) of widows of asbestos insulators who were aware of the association of their husbands' deaths to asbestos work indicated that this knowledge most often came from information other than that customarily available on the death certificate.

Understandably, awareness of the work-relatedness of the disease was a critical factor in whether or not claims for workers' compensation were filed during disability or by survivors after death. Among survivors of the asbestos insulators, 53% of those who were aware at the time of death of the relation of their husbands' disease to previous employment sought workers' compensation benefits. Only 26% of those not so aware at the time of death subsequently learned of the occupational origin and filed claims for death benefits. Overall, only 36% of the deaths from asbestos-associated disease among the nationwide insulators cohort resulted in the initiation of workers' compensation claims by survivors.

There was considerable variation in the proportion of widows filing claims depending on the state in which the former asbestos worker was last employed; e.g., in Michigan 59% of the widows filed claims; New Jersey, 76%; New York, 73%; and Ohio, 76%; in contrast to Illinois, 14%; and Indiana, 13%. This could reflect variations in both the legal compensation environment of the states and the effectiveness of information and advocacy networks within the areas.

While a high proportion of the survivors of the insulators were aware of the relationship between asbestos and their husbands' diseases and knew they might be eligible for workers' compensation, this was not so for workers exposed in other circumstances. Among survivors of asbestos factory workers whose exposure to asbestos ceased a number of years before manifestation of disease and death, claims for workers' compensation death benefits were filed by only 14% of the surviving widows. (The factory opened in 1941 and closed in 1954). Those widows who did not file claims indicated that lack of advice concerning eligibility for workers' compensation was more of a reason for not filing a claim than ignorance of the asbestos etiology of their husbands' diseases.

The age of the worker at death (and the widow's age) was a significant factor as to whether workers' compensation benefits were sought among all groups of workers and survivors studied. Survivors of those who died after age 65 (and particularly after age 70) sought workers' compensation considerably less often than survivors of workers who died when younger.

Outcome of workers' compensation claims

Nearly all of the survivors of the asbestos insulators who filed workers' compensation death claims ultimately received benefits. However, the process of obtaining benefits involved a considerable amount of contention and sometimes long delays. Nearly half of the survivors' claims were contested by insurers. The most common cause of dispute was that the illness was not work-related. Considerable periods of time passed before survivors' claims were resolved. Overall, two-thirds of the claims filed took more than a year to resolve.

Of those survivors receiving workers' compensation benefits, two-thirds were awarded benefits, presumably in conformity with state law. The remaining third reached a settlement agreement with insurers. One-time, lump sum payments were made in 69% of the workers' compensation claims resolved by settlement agreement. The mean value of these settlements was $18,900. In contrast, single lump sum payments were made in 18% of the deaths compensated through formal awards of State agencies. The mean value of these lump sum awards was $22,800. In almost 60% of cases where a benefit award was made, benefits were paid for an indefinite period of time. The mean payment for these benefits was $95 a week. The replacement value of these payments is considered below.

Four of every five survivors who received workers' compensation benefits were assisted by an attorney. The cost of this assistance was about $3,800 for the successful claimant.

Product liability lawsuits

Among survivors of the asbestos insulators, 16% filed third-party lawsuits against manufacturers of asbestos products. Lawsuits, like workers' compensation claims, were more likely to be filed by younger survivors. Widows aged 45-59 were more than twice as likely to file suits as widows aged 65 and over.

The incidence of third-party lawsuits has grown dramatically in recent years. Survivors of 3% of the insulators who died between 1967 and 1968 filed third-party suits. This increased to 32% of the survivors of those who died between 1975 and 1976. Twenty-five percent of those who filed workers' compensation death claims also chose to institute third-party lawsuits compared to 10% of those who did not seek workers' compensation. However, 57% of those who filed tort suits had active or closed workers' compensation claims.

There were variations in the initiation of tort suits depending on the state in which the worker was last employed. Among states where a significant number of asbestos-associated deaths occurred, the incidence of lawsuits was highest in California, Missouri, Ohio, and Texas.

The most common outcome of third-party tort suits was an out-of-court settlement agreement between plaintiffs and defendants. Settlements for deaths occurring from 1967 to 1976 ranged from $1,000 to $300,000 with an average settlement of $72,000. The average legal fee in these settlements was $28,500; the average ratio of legal costs to total recovery was 37%.

Economic costs of asbestos-associated disease

Disability. Upon becoming disabled from asbestos-associated disease (shipyard workers in Massachusetts and Maryland, asbestos insulators in New Jersey and New York and former workers of a Paterson, New Jersey asbestos factory), few relied primarily on income support from workers' compensation. The primary source of support for long-term disability among these workers was Social Security either through its disability insurance program or through early retirement.

Private pension plans (both company-administered and Taft-Hartley types) were also major income sources through long-term disability coverage and early retirement provisions. Only among the asbestos insulators in New Jersey and New York were workers' compensation benefits a significant source of income during disability from an asbestos-associated disease (primarily asbestosis). Among the shipyard workers studied, recognition of occupational asbestos disease was more recent than among the insulators. Therefore potential claims for workers' compensation may not have been initiated due to lack of recognition of asbestos-impairment.

The cost in lost economic output (social cost or lost wages) attributable to asbestos-associated disabilities was $172,213 per worker. The total private losses (lost wages after deduction for taxes) borne by disabled workers and their households due to asbestos-associated disease were calculated to be an average of $127,151 per household. These losses were partially replaced by various compensation programs (particularly Social Security disability insurance and private pensions). For those disabled from all causes in the shipyard cohorts, approximately

62% of wage and household losses were compensated by one or both of these sources. These estimates of losses do not include the costs of medical care or welfare.

Mortality. Deaths of 515 asbestos insulation workers from asbestos-associated disease from 1967-1976 resulted in a loss of economic output (social cost) of $347,392 per worker from the time of the workers' death until he would have been 65. The total private cost (lost wages after deductions for taxes and consumption by workers) borne by the deceased worker's survivor is $163,236 per household. In addition to the losses due to the workers' death, economic costs also resulted from the workers' period of disability before death. These costs amounted to $45,865 in social costs and $35,963 in private costs per household. These additional disability losses, which are considerably less than among the other cohorts studied, reflect shorter periods of disability from cancer in contrast to the more extended disability due to asbestosis among the living workers examined. Workers who suffer cancer die too soon after initial disabling symptoms--sometimes surviving only weeks or months--for prolonged disability.

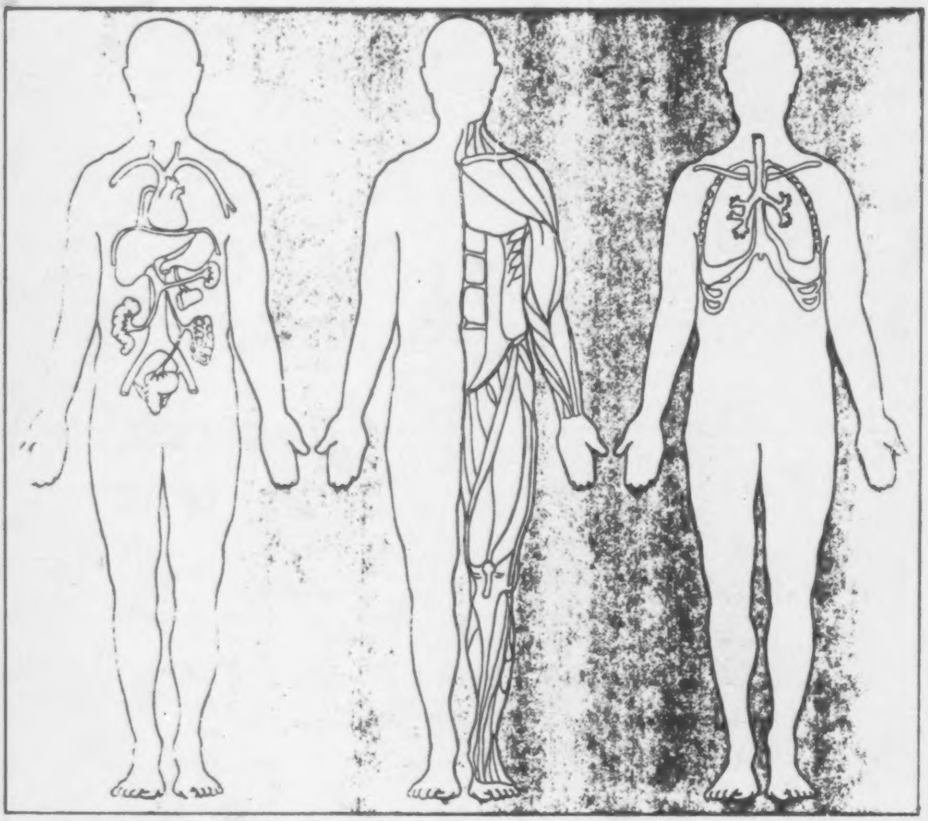
These estimates do not include the costs of medical care or welfare payments, but do consider economic losses associated with lost wages, income taxes and a deduction for consumption by the worker. These losses were partially compensated by a number of public and private survivorship programs, including Social Security, workers' compensation, union welfare and pension programs and veterans' benefits. However, 25% of the widows whose husbands would have been less than age 65 in 1979 (the year for which data on compensatory incomes are available) received no current private or public transfer payments or income from previous workers' compensation or tort suit lump payments.

Overall, public and private transfer payments replaced 40% of the private losses for those who received them. If those who did not receive current transfer income are included, the average for all widows whose husbands died from asbestos-associated disease was much lower, approximately 20%.

EXHIBIT 2

An Interim Report To Congress On Occupational Diseases

Submitted To Congress
U.S. Department of Labor
Assistant Secretary for Policy, Evaluation
And Research
1980



SUMMARY OF FINDINGS

The Black Lung Benefits Reform Act of 1977 directed the Secretary of Labor to prepare a report examining several issues concerning occupational diseases. This report addresses four major issues:

(1) the magnitude and severity of the occupational disease problem, with particular emphasis on pulmonary and respiratory diseases;

(2) the status and adequacy of existing compensation programs to deal with occupational diseases;

(3) alternatives for improving compensation systems; and

(4) the adequacy of occupational disease prevention programs.

Magnitude and Severity of Occupational Diseases

--The long-latency period associated with most chronic diseases and cancer and the interaction of multiple causal factors makes it difficult to estimate the magnitude of the occupational disease problem. However, epidemiologic statistics show that workers exposed to certain substances such as asbestos, cotton dust, and silica experience excess disability and/or premature death. Traditional sources of data include: employer records required by OSHA, state workers' compensation records, and physician reports. Employer records understate the occupational disease problem because affected workers may no longer be employed by the firm where the exposure occurred. In addition, some employers are reluctant to report occupational diseases when they are diagnosed because of their potential financial liability. Workers' compensation data understate the problem for similar reasons. The lack of a universal data system and limitations imposed by state compensation laws also reduce the usefulness of workers' compensation data. Physician-based records also understate the problem because few physicians are trained to recognize chronic occupational diseases and cancer.

--Because the traditional approaches understate the magnitude of the occupational disease problem, an analysis was undertaken of individual self-reporting of work-related illness. This analysis assumes that an individual worker with a diagnosed medical condition is able to determine the work-relatedness of that condition. Information was obtained from an interview survey which has no direct link to compensation benefits. There was no financial incentive therefore for individuals to overstate the occupational origin of their illness. These data are limited to disabled individuals between the ages of 20 and 65. The data do not include individuals over the age of 65 or those who may have died from occupational diseases. Occupational related cancer deaths are therefore omitted from these data.

--Almost two million workers reported that they were severely or partially disabled from an occupationally-related disease. Approximately 700,000 of these occupational disease victims suffer long-term total disability. The 1.2 million workers partially disabled from an occupational disease were either temporarily out of the labor force because of their disability or limited in the kind and/or amount of work they could perform. These data include chronic cases of totally disabling byssinosis and asbestosis, as well as, partially disabling conditions, such as varicose veins, arthritis and ulcers. The major disabling conditions reported by workers as being related to their jobs include: back and spinal conditions (34 percent); heart and circulatory illnesses (26 percent); respiratory conditions (13 percent); mental illnesses (9 percent); and digestive conditions (8 percent). In 1978, the lost income for disabling occupational diseases amounted to $11.4 billion.

--There is a long lag between exposure and compensation claims due to the long-latency period between exposure to hazardous substances and the onset of disability and/or death. Analysis of workers exposed to 10 substances known to cause chronic respiratory diseases and cancer of the respiratory tract in large groups of workers indicates that future deaths and disabling conditions due to past exposures will present a major problem for our health care systems and income maintenance programs. This analysis also indicates the need to collect more and better data on occupational diseases.

Adequacy of Existing Compensation Systems

--A general measure of the adequacy of compensation for occupational disease victims can be ascertained by examining the extent to which lost earnings are replaced. Such data show that public and private income support programs replace about 40 percent of the wages lost by individuals who are severely disabled from an occupational disease, compared with a 60 percent replacement rate for occupational injury victims. The major source of extra income support received by occupational injury victims is workers' compensation.

--The major sources of income support for those severely disabled from an occupational disease are: social security (53 percent), pensions (21 percent), veterans benefits (17 percent), welfare (16 percent), workers' compensation (5 percent), and private insurance (1 percent).

--Not all of those severely disabled from an occupational disease receive income support, while some receive support from more than one program. Among those severely disabled from an occupational disease, one out of every four receive no income support payments. One in every three receive multiple benefits.

Workers' Compensation:

--State workers' compensation benefits are supposed to replace two-thirds of the employee's lost income for a work-related injury or illness. Employers agreed to provide "no-fault" workers' compensation benefits as part of an historic compromise in which workers gave up their rights to sue employers. A worker, therefore, is not required to prove employer negligence, but is required to prove that an injury or illness was caused by the job.

--Only five percent of those severely disabled from an occupational disease receive workers' compensation benefits. This lack of coverage is due, in part, to the difficulties involved in establishing the work-relatedness of disabling illnesses because of: (a) the length of time which has elapsed between the hazardous exposure and the onset of disability and/or death, (b) the multiple causes of diseases, and (c) associating occupational diseases with employment experience at specific firms. Therefore, claims are often not fully compensated and litigation is more commom.

--The problems facing occupational disease victims seeking workers' compensation benefits are illustrated by the following:

On average a disabled worker with an occupational disease waits a year before receiving the first payment of compensation benefits. By comparison, work-injury cases are settled in an average of two months.

Sixty percent of all occupational disease awards were initially denied, while only 10 percent of the injury awards received similar treatment.

Over half of all occupational disease awards rely on compromise and release agreements which involve small lump sum settlements and release insurance carriers from further liability for both income maintenance and health care costs. Only 16 percent of all injury awards receive such treatment.

A worker who becomes totally disabled for life from an occupational disease and who is able to prove that the disability is linked to the workplace receives, on average, about $9,700 in total compensation benefits compared to expected future earnings of $77,000. This implies that workers' compensation benefits replace about one-eight of lost wages.

Apart from the medical complexities involved in determining the work-relatedness of occupational diseases, a number of State workers' compensation laws contain restrictive provisions which act as legal barriers for otherwise worthy claims e.g., time limitations on filing a claim, limitations as to the recency of exposures, special limitations on benefit payments, and coverage exclusions for certain diseases.

--About 60 percent of the premium dollar collected for workers' compensation insurance is paid out as cash or medical benefits. Therefore, 40 cents out of every premium dollar pays for something other than current benefits: e.g., insurance company reserves, dividends, litigation, overhead, etc. Since litigation is more prevalent for occupational disease claims, it is likely that the legal-administrative costs associated with these cases are higher than for the average workers' compensation case. In addition the 60 percent paid out in benefits includes the legal fees which a claimant must pay out of their benefit allotment.

Social Security and Welfare:

--Two of the major sources of income for those severely disabled from an occupational disease are social security and welfare programs - 53 percent receive social security benefits while 16 percent are welfare recipients. Those eligible for social security disability benefits in 1978 received an average annual payment of $3,900; recipients of supplemental security income received an average annual payment of about $1,900. Occupational diseases are costing the social security and welfare systems about $2.2 billion annually.

--The social security disability insurance program spends about 5 cents out of every dollar on administrative and legal expenses. This compares very favorably with State workers' compensation programs.

--While the social security system is the major source of income support for those severely disabled from an occupational disease, not all severely disabled workers are eligible for social security benefits. The major reason for this is that they cannot meet the "recency of employment" requirement. Even for those disabled individuals eligible for SSDI benefits, there is a five-month waiting period for cash payments and an additional waiting period of two years for Medicare benefits.

Black Lung Benefits:

--Recognizing the unique features of some occupational diseases, the Federal Government initiated a compensation program for black lung victims. Since its inception in the early 1970's, the Black Lung Program has been under conflicting pressures from miners to liberalize eligibility requirements and assess costs to industry; and from coal operators to tighten eligibility requirements and finance benefits through the Federal treasury.

--Today the program provides benefits to about 450,000 disabled miners, widows and dependents. A disabled miner with one dependent receives about $4,200 a year in compensation payments. As a result of the Black Lung Amendments of 1977 program expenditures have increased from $1.1 billion in 1978 to $1.6 billion in 1979. Some of this increase reflects one-time payments for retroactive claims.

Alternatives for Improving Compensation Benefits for Occupational Diseases

Given the shortcomings of existing programs, the report discusses three alternatives.

- o building onto the social security disability insurance program;
- o a strengthening of the workers' compensation system; and
- o a substance-by-substance compensation program.

--Building onto the existing social security disability insurance program (SSDI) would include: supplemental disability payments to SSDI recipients who meet specific occupational disease criteria; possible modification of the eligibility requirements for the SSDI program; and the establishment of industry trust funds to finance supplemental benefits. Possible modifications in SSDI eligibility requirements include: reducing the "recency of employment" requirement; applying a uniform definition of disability to all workers over the age of 55; reducing the five-month waiting period for cash payments; and eliminating the two-year waiting period for medicare benefits.

--Restructuring the workers' compensation system would include: the use of legal presumptions based on the best available scientific evidence to establish the work-relatedness of specific diseases; the establishment of an industry-financed hazardous substance trust fund to pay benefits and thereby lessen the incentive of individual firms to litigate disease claims; elimination of restrictive legal provisions in State workers' compensation laws which act as artificial barriers to worthy claims; and the establishment of a neutral administrative body to administer the claim determination process.

--The development of a substance-by-substance approach would entail components similar to a workers' compensation program for a single disease. However, benefits would be limited to workers disabled from specific industrial health hazards, such as asbestos, cotton dust, silica, etc. Payments would also be financed through an industry trust fund.

Adequacy of Occupational Disease Prevention Programs

--Given the magnitude of the occupational disease problem and the limited ability of the workers' compensation system to provide an economic incentive to clean up the worksite, the prevention of occupational diseases is a critical issue. Available evidence indicates that OSHA health standards reduce exposure to hazardous substances. However, there are major policy issues which require attention, specifically, (a) the limited availability of epidemiologic data to establish health standards and defend them in legal and economic terms, (b) the contentious nature of the standard-setting process, and (c) the lack of sufficient economic incentives for firms to reduce exposures to health hazards. The Department of Labor is currently developing management strategies to address these issues.

--In order to evaluate the effectiveness of OSHA health standards it is necessary to compare the health symptoms of workers exposed at various levels of emissions with nonexposed workers. Work history information, as well as medical data, needs to be collected over time to deal with the latency factors inherent in occupational diseases. Such a data system would take into account job transfers, retirements and deaths among the workers being studied. The most promising vehicle for such data collection are longitudinal cohort studies similar to those available for asbestos and textile workers.

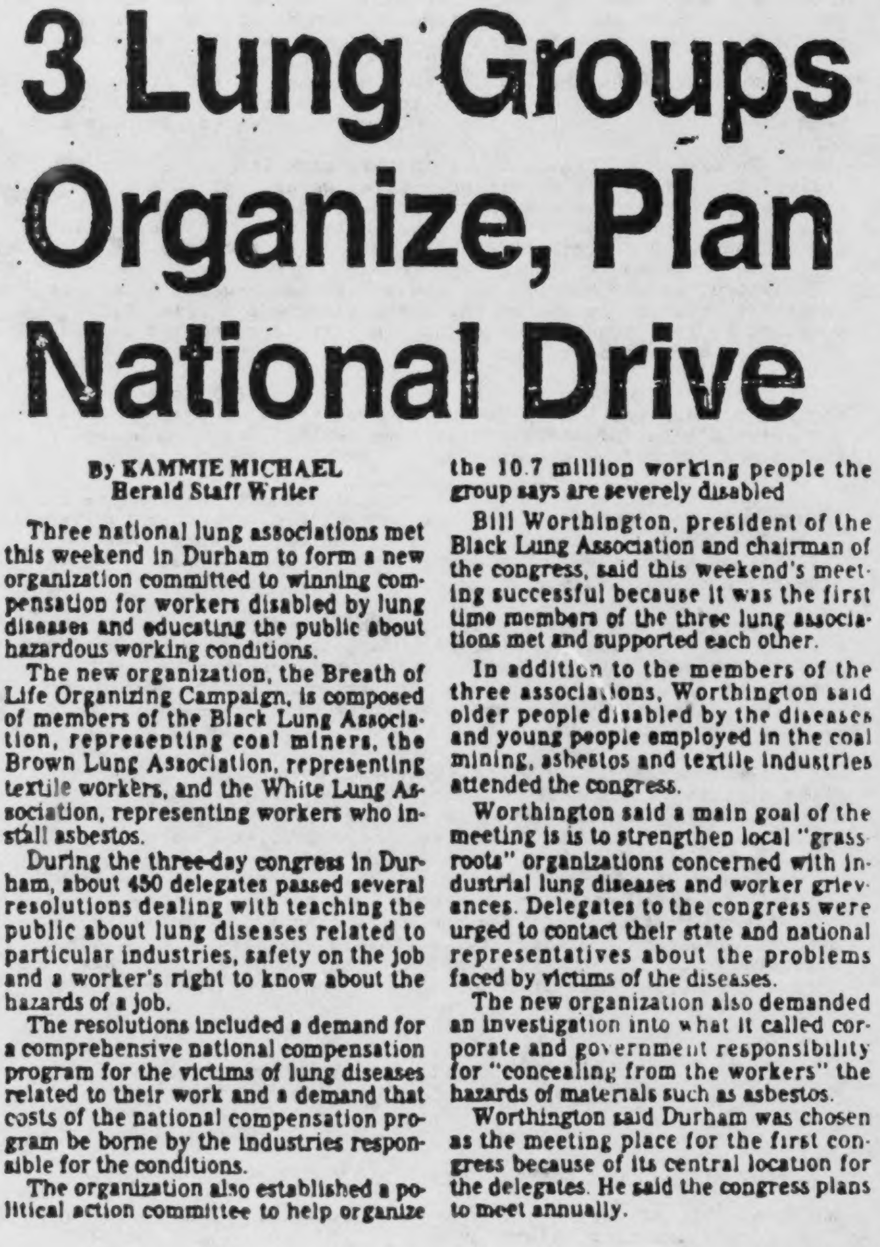
Research and Data Collection

--Regardless of which alternative is selected to compensate occupational disease victims research is needed to address several issues - (1) establish a list of compensable diseases; (2) develop presumptive standards; (3) analyze alternative financing mechanisms; and (4) estimate the number of workers and survivors to be covered and the costs.

--Related research is also needed to improve the collection and analysis of data on occupational diseases.

EXHIBIT 3

(From the Durham, N.C., Herald, Monday, Sept. 20, 1982)



3 Lung Groups Organize, Plan National Drive

By KAMMIE MICHAEL
Herald Staff Writer

Three national lung associations met this weekend in Durham to form a new organization committed to winning compensation for workers disabled by lung diseases and educating the public about hazardous working conditions.

The new organization, the Breath of Life Organizing Campaign, is composed of members of the Black Lung Association, representing coal miners, the Brown Lung Association, representing textile workers, and the White Lung Association, representing workers who install asbestos.

During the three-day congress in Durham, about 450 delegates passed several resolutions dealing with teaching the public about lung diseases related to particular industries, safety on the job and a worker's right to know about the hazards of a job.

The resolutions included a demand for a comprehensive national compensation program for the victims of lung diseases related to their work and a demand that costs of the national compensation program be borne by the industries responsible for the conditions.

The organization also established a political action committee to help organize the 10.7 million working people the group says are severely disabled

Bill Worthington, president of the Black Lung Association and chairman of the congress, said this weekend's meeting successful because it was the first time members of the three lung associations met and supported each other.

In addition to the members of the three associations, Worthington said older people disabled by the diseases and young people employed in the coal mining, asbestos and textile industries attended the congress.

Worthington said a main goal of the meeting is is to strengthen local "grass roots" organizations concerned with industrial lung diseases and worker grievances. Delegates to the congress were urged to contact their state and national representatives about the problems faced by victims of the diseases.

The new organization also demanded an investigation into what it called corporate and government responsibility for "concealing from the workers" the hazards of materials such as asbestos.

Worthington said Durham was chosen as the meeting place for the first congress because of its central location for the delegates. He said the congress plans to meet annually.

RESOLUTIONS ADOPTED BY THE FIRST CONGRESS OF DISABLED WORKERS

Durham, North Carolina
September 17 - 19, 1982

INVOCATION

Dear Lord,

Be with us this morning. Forgive that our mouths do not know one common word with which to call your name. You are that which is the best and most beautiful, the most just and merciful, the most loving and healthy in our world and in our human spirit.

We share that shining light of hope and faith, of justice and love that has brought us here today. Do not let that light be dimmed. Let it shine to light our way that we may do your work.

We face a difficult task. We are each limited by our own individual desires and experiences. Yet we are pulled toward oneness by the desires and experiences we share as a class. Lord, this is your world; we know you have called us to this struggle and we thank you for giving us what we need to overcome.

Lord, we ask humbly that you accept our anger. Accept it as the exterior trappings of our compassion. Do not let us be consumed by it. Temper it with our intelligence and let us use this great gift to solve the problems life puts before us.

Help us together to resolve who are our real friends and who are our enemies. Help us to discover those ways in which we can unite all our brothers and sisters and keep us from being fooled and divided by our enemies.

Lord, confirm in our hearts that it is not selfishness that leads us to stand up and fight for what we need in order to live. We could certainly give our very lives for our friends. But strenghten the resolve in us not to spend one more breath for war, disease, and exploitation.

Lord, we ask that you be with those who cannot be with us today: the sick...let our efforts bring them renewed strength and joy; ...those we left at home, without whose support we would not be here; ...those millions in countries around the world who have even less than we and whose suffering many times makes ours pale by compassion.

We remember today all those who have gone before us. Each of us carries in our heart someone we have loved and thousands we have never known who will not see the victory with us, but in those memory we recommit ourselves to the battles ahead.

Jesus of Nazareth, whom many call your Son, said He lived to make the blind see, the lame walk, and to liberate the oppressed. We truly continue in His footsteps in the battle against disease and disability, against all limitations of the development of the human body and spirit. He gladly gave His life. May we use ours in His spirit so that soon your will may be done on Earth.

Amen.

by Marilyn Hunter, Family Project Director
White Lung Association

RESOLUTIONS FROM PREVENTION AND COMPENSATION WORKSHOP

WHEREAS: 5.5 million American workers suffered a job-incurred illness or injury in 1981;

WHEREAS: 116,000 American workers die each year from a job-incurred illness or injury;

WHEREAS: Less than 5% of American workers suffering from a job-incurred occupational disease ever receive workers' compensation;

WHEREAS: Less than 15% of American workers suffering from a job-incurred injury ever receive workers' compensation;

WHEREAS: 70% of disabled American workers intially applying for Social Security Disability benefits are denied;

WHEREAS: 80% of those disabled American workers who have been denied Social Security Disability benefits never work again;

WHEREAS: The majority of disabled American workers have become public assistance recipients;

THEREFORE: Let it be resolved that this Congress recognizes that workmen's compensation laws as practiced in all its forms in the United States are acts of fraud, perpetuated by an oppressive government, one dominated by business interests, and in conspiracy with those same business interests and the majority of those in the medical and legal and bureaucratic profession and that this conspiracy culminates in the abrogation of the civil, constitutional, and human rights of disabled American workers;

FURTHER: Let it be resolved that these abrogations of human rights be brought to the attention of the Human Rights Commissions in the United Nations and Helsinki;

FURTHER: Let it be resolved that the Breath of Life Organizing Campaign, Inc., become a permanent body which will include a standing committee devoted to prevention and compensation;

FURTHER: Let it be resolved that this committee pursue the passage of a National Workers' Compensation Act that would establish equity and parity in all of the existing federal and state acts with the continuance of workers' rights to pursue third-party suits, and that this act would include the 33 points discussed and approved by the Prevention and Compensation Workshop;

FURTHER: Let it be resolved that this Congress endorse and support the recommendations dated June 27, 1982, entitled "Recommendations on Disability Amendments of 1982 - HR 6181" and "Recommendations on the Federal Black Lung Program" submitted by the Chicago Area Black Lung Association;

FURTHER: Let it be resolved that this Congress endorse and support the Brown Lung Association in its efforts to retain and if possible, lower the present dust level standards;

FURTHER: Let it be resolved that this Congress endorse and support the White Lung Association and other asbestos victim organizations in their efforts to defeat the Chapter 11 bankruptcy filings by Johns Manville and other corporations;

FURTHER: Let it be resolved that this Congress endorse and support the White Lung Association in its efforts to defeat any and all attempts to contain workers' rights to pursue third-party suits;

FURTHER: Let it be resolved that this Congress give a vote of thanks for a job well done to the coordinators of the conference, the attending members, and the staff and workers of the Sheraton University Center.

SOLUTIONS TO RAISED WORKSHOP PROBLEMS

1. Presumption of payment until settled - no back pay when controversion overturned - insurance company or corporation should pay double of average return on investment;
2. Penalties to be levied against attorneys unprepared on trial date;
3. Establishment of automatic survival benefits when controversions pending;
4. Cost of living adjustment for workers' compensation;
5. System accountability for damages (mental);
6. System accountability for additional damages - physical and financial;
7. Companies to reimburse Government for social costs - strengthened SSD;
8. Duty of fair representation suits for union misrepresentation;
9. Forming of workers' compensation - Department - Educational section;

10. Establishment of laws guaranteeing presumption of causes;
11. Outreach to committee re: awareness of total problems;
12. See #1;
13. See #7;
14. No evidence from any other previous hearing to be admissible in present hearing;
15. Approval fees guaranteed - legal representation guaranteed - fee penalty;
16. Reestablishment of workers' constitutional rights;
17. Sec #1;
18. Establishment of state-by-state Social Services backup for compensation victims guaranteed minimum income;
19. See #1, 6, and 16;
20. Formation and continuation of strong workers' coalition;
21. Monitoring of present system;
22. Right to know, right to refuse dangerous work; stronger OSHA;
23. See #16;
24. Law to allow worker participation in safety and health monitoring;
25. :
26. : Laws to allow direct suit by individuals against
27. : corporation violation of safety and health laws;
28. :
29. Body to establish rules and monitor activities of professionals, medical and legal re: workers' compensation;
30. Claimant contributory factors to be excluded from evidence;
31. Research and development data re: female workers' needs (on-the-job safety and health);
32. SSD - introduction of additional medical evidence to be admissible at any point;
33. See #22.

RESOLUTIONS FROM SOCIAL COST OF OCCUPATIONAL DISEASE WORKSHOP

WHEREAS: The cost to the general public (social cost) of occupational disease destroys the lives of its victims and their families;

WHEREAS: The social costs of occupational disease far exceed the small compensation presently paid to victims and survivors;

WHEREAS: The social costs of occupational disease increase taxes for the general public;

WHEREAS: The social costs of occupational disease can be reduced significantly by programs of prevention;

WHEREAS: The social costs of occupational disease are widespread and borne by the public because there is no system which holds those who cause occupational disease accountable for their acts;

THEREFORE: Be it Resolved:

That-Breath of Life Organizing Campaign (BLOC) adopt a program to educate the general public as to the social cost of occupational disease which includes the following activities;

That-All BLOC members write their elected representatives before October 1, 1982, expressing their outrage at the failure of the government to hold business accountable for causing occupational disease and its widespread social cost;

That-A BLOC committee of Helen Powell (Black Lung Association), Jim Fite (White Lung Association), and Nat Wilkins (Brown Lung Association) develop a draft pamphlet explaining the social cost of occupational disease before November 1, 1982;

That-BLOC members organize demonstrations (date suggested: day before Thanksgiving or day before election) to bring public attention to the cost of occupational disease;

That-BLOC committee distribute by October 15, 1982, a Candidates Quiz to all elected officials representing them. That this quiz be tailored after the Social Security Disability benefits notice to read: If this questionnaire is not returned in 10 days it will be assumed that you do not request review of our cancelation of occupational disease victims' support for you. That the quiz have 5 questions: Have you ever worked for a wage? Do you know any workers disabled from their occupation? Do you know how many voters in your representative area are disabled from occupational injury or disease? Do you support the present Social Security Disability cutbacks? Will you meet with a delegation from BLOC before and after November 4, 1982? That the results of this Candidates Quiz be publicized.

That-All BLOC members issue this resolution as a press release by October 15, 1982.

That-The aforementioned BLOC committee prepare a pamphlet noting that the cost of the support of anti-labor governments, such as the Philippines, where many of the textile mills have gone, and the military budget--must be directed to programs of public health, programs which will prevent and properly compensate.

That-The BLOC investigate the possibility of demands to require the immediate repayment of interest on loans which were extended interest free to business and WW II Allies for a fund for disabled workers' support.

That-BLOC begin a TV-radio show Bliz to explain to the public why they should support programs of prevention/regulation and programs of swift and full compensation for occupational disease victims.

That-BLOC members answer every timely news story on occupational safety and health with letters to the editor which explain the activities of BLOC.

That-BLOC take its message to the community, schools, and churches.

That-BLOC take its message on the social cost of occupational disease to the active work force stressing the need for unity between the workers in this country and workers of the rest of the world.

WHEREAS: The deliberate violation and disregard of safety measures by big business has resulted in the crippling and destruction of the lives of millions of American working people;

THEREFORE: Be it Resolved:

That-BLOC is opposed to making the American working people pay for the costs of occupational disease. The responsibility for compensation and social programs for disabling diseases should be placed on the corporations.

That-BLOC believes that the tax burden should be shifted from the backs of the victims of corporate greed to those who have profited from the suffering of working people.

RESOLUTIONS FROM POLICITAL ACTION WORKSHOP

We, the Political Action Workshop members, recommend the establishment of a committee to develop a comprehensive national program that will assure that each and every worker will receive reparations from those employers and corporations who have ruined their health and that such program must be linked to a prevention program that will guarantee no more generations of workers disabled by occupational disease.

Within the current economic and political environment workers' health, safety, and compensation programs have been sacrificed to save corporate profits. Government and business claim that now is not the time for gains for workers, but instead the time for concessions from them. Furthermore, the primary methods used to protect workers' interests are a failure. For example, the efforts of small groups of professional lobbyists to defend the Black Lung program for Black Lung victims or the attempts to establish protections and/or compensation for Brown and White Lung victims have been less than effective.

If we are to achieve our goals -- a safe, healthy work place and guaranteed compensation for victims of occupational disabilities -- we must undertake mass political action built on the broadest possible base. The value of this approach has been proven by our history. For example, miners won the first federal law which recognized and compensated victims of occupational disease through this mass collective action -- thousands of miners struck and stopped coal production in many Eastern states. It was this type of action that forced the politicians to pass the Black Lung Act.

Therefore, the Breath of Life Organizing Campaign should establish a Political Action Committee to help organize a mass political base which can undertake a wide range of unified activities. These activities include, but not are limited to: (a) fund raising (through a 501(c)(3) entity); (b) strikes, (c) demonstrations; (d) political education; (e) public hearings; (f) voter registration; (g) petitions; (h) picketing, etc.

We must go home to our factories, mines, and communities and begin to build this base.

Proposed Resolutions

1. BLOC to form a committee to draft a National Uniform Compensation Act (to deal with prevention and compensation) (Vince Carroll).
2. Recommend that Marco Jaurez, San Diego NASCO, Fred Carter, Mobile Shipyard Workers, and UMWA be represented on the floor Sunday.
3. To form BLOC-PAC in order to raise money to use in political activities. To form a national campaign to deal with the passage of a National Uniform Compensation and Prevention Act (Blue Lamm).
4. Call for a freeze on concessions by unions on a National Uniform Compensation and Prevention Act. Directed to rank and file as well as disabled workers (Fred Newfield).
5. Insure corporate liability for occupational disease. The corporation should be directly responsible for payment of damages (Linda Thomas).
6. BLOC should pursue investigation into Human Rights violations by corporations and to see that they are held responsible for their actions (Ron Simon).

Adopted Recommendations

1. Create a committee to draft National Uniform Compensation and Prevention Law that also deals with work place environment. Also, national campaign to deal with the passage of the National Uniform Compensation and Prevention Law.
2. Call another convention and invite foreign workers in order to broaden base. Vietnam Vets and Vets exposed to radiation should be included.

RESOLUTIONS FROM THE UNITY WORKSHOP

WHEREAS: The BLOC needs to insure unity and cohesion among its basic three components (the Black Lung Association, the Brown Lung Association, and the White Lung Association);

THEREFORE: Be it Resolved:
That-A system of intercommunication be instituted between both the leadership and the members of the above-named components, utilizing such means as a BLOC Directory, newsletters, joint publications and press campaigns, a central resource bank, a 24-hour tape, "telephone trees," "word-of-mouth," "pen pals," national and area meetings, and whatever else is deemed necessary.

WHEREAS: Any resolve for unity and action, information exchange and mobilization must include consideration for adequate funding;

WHEREAS: We must assure that the fund raising efforts of the Breath of Life Campaign are coordinated with those of the individual Associations, so that Campaign efforts do not detract from, but increase, the possibilities for growth of the member organizations;

THEREFORE: Be it Resolved:
That-The Board of Directors appoint an advisory financial committee which will include the main fund raisers of the organizations involved to advise the board and coordinate fund raising efforts.

WHEREAS: Our unity will only be real if it is expressed in common action toward our goal;

WHEREAS: This action can only be assured if organizational steps are taken to carry it out;

THEREFORE: Be it Resolved:
That-National mobilizations and campaigns be begun to manifest this unity and be it further resolved that a committee be set up in each local organization which is a part of the Breath of Life Organizing Campaign to facilitate the carrying out of the decisions of the Congress and the Board of Directors.

WHEREAS: There are many areas of the country where only one of the three occupational lung associations is carrying out activity;

WHEREAS: There may be in those areas workers who suffer from other diseases whose needs could be met more fully by the growth in that area of one of the sister organizations;

THEREFORE: Be it Resolved:
That-The member organizations of the Breath of Life Organizing Campaign will incorporate into their BLOC work these disabled workers and will support their efforts to communicate with their national organization and the growth of a chapter of such organization.

WHEREAS: The interim Board of Directors of the Breath of Life Organizing Campaign has completed its task;

THEREFORE: Be it Resolved:
That-A New Board of Directors be elected no later than October 19, 1982. It will, therefore, be the responsibility of each Association to submit the names of three nominations to the present board no later than October 19, 1982;
That-All members of the coalition will (1) actively participate in the priority campaigns locally and nationally (if possible); (2) take part in the newsletter on a rotating basis; (3) share membership lists;
(4) encourage individuals to write letters to other Association members in order to strengthen the bonds between the Association and the common struggles;
(5) develop phone trees to facilitate coordinate mobilization of the combined associations.

WHEREAS: It is important that the identity and work of the Breath of Life Organizing Campaign receive the broadest national attention;

WHEREAS: It is also important that the integrity of each of the Associations be preserved and their work developed;

THEREFORE: Be it Resolved:
That-The individual organizations incorporate into their publicity the initials of the Breath of Life Organizing Campaign (BLOC) following the name of their organization.
That-A by-laws committee of two members from each Association shall be formed to review and recommend amendments to the new Board of Directors if necessary as soon as it is elected.

RESOLUTIONS FROM CONCESSIONS WORKSHOP

With our country in its deepest economic crisis since the Great Depression of the 1930's, the word concessions takes on a whole new meaning. It no longer refers to wages and benefits won for workers in strikes and contract negotiations or legislation like Medicare, the Black Lung Act, or the OSHA Asbestos Regulations.

Today, concessions means the demand of the capitalists that rule our country that the working class bear the brunt of the economic crisis and accept more unemployment and a lower standard of living. Today, concessions means wage cuts and freezes, the abandonment of plant safety programs, and the rapid destruction of government programs that the labor movement fought for over 50 years to achieve.

There are voices in the labor movement who preach accepting concessions to save jobs, who preach accepting cuts in the Black Lung Act and Social Security Disability to avoid even worse cuts. But the 80,000 Chrysler workers who were laid off after the Union accepted the historic 1979 concessions shows the lie to that argument. **Today the struggle of the Chrysler workers** to win back every penny given up in 1979 and the struggle to defend and extend Social Security Disability benefits is leading the way in the fight against concessions. The Breath of Life Organizing Campaign is committed to breathing new life, a new wind, into the political life of our country. Today that means playing our part in the defense of our standard of living and not giving an inch to the concession demands being organized against the working class.

Be it therefore resolved: That the Breath of Life Organizing Campaign strongly endorses the efforts of the Chrysler workers to win parity with GM and Ford workers, and that the Breath of Life Organizing Campaign itself will oppose any cuts in job safety programs, will oppose the concession demands of the Manville Corporation, and will oppose all attempted concessions in disability benefits and public health programs.

RESOLUTIONS FROM HUMAN RIGHTS VIOLATIONS

WHEREAS: Millions of working people and their families have been injured and killed by industrial disease;

WHEREAS: While these injuries were needlessly taking place and the U.S. Government (1) knew about the risks to workers and (2) did nothing to inform workers of these risks **but instead kept the known dangers secret from workers;**

WHEREAS: Because of U.S. Government involvement in occupational disease, and because law enforcement officials are doing nothing to investigate or prosecute the people responsible for the injuries and deaths willfully and maliciously caused by occupational disease;

THEREFORE: Be it Resolved:

That-The Breath of Life Organizing Campaign seek information on the knowledge and complicity on the part of the Government in causing occupational disease and that BLOC educate the public about this.

That-BLOC investigate the human rights violations by the U.S. Government in causing and covering up occupational disease and that BLOC pursue and present these human rights violations to appropriate bodies, especially the Inter-American Commission on the Rights of Man at the Organization of American States.

That-If law enforcement officials continue to refuse to prosecute the people responsible for the injuries and deaths to workers caused by occupational disease, that BLOC itself investigate, prosecute, and try these people and companies for their crimes.

RESOLUTIONS FROM OUTREACH WORKSHOP

WHEREAS: The Breath of Life Organizing Campaign must be built through massive organizing at the local level;

WHEREAS: We must rely strongly upon our own people -- the disabled and working people making up the Black, Brown, and White Lung Associations to explain the Breath of Life Organizing Campaign to other disabled workers and workers at risk;

THEREFORE: Be it Resolved:

That-We call upon each chapter of each Association making up the Campaign to recruit each member of the chapter as a committee of one who will be committed to recruiting large numbers of disabled workers and workers at risk who will in turn recruit even larger numbers to the Campaign until disabled workers and workers at risk are as powerful a force as they can be.

FURTHER: That-We call upon each Association to recruit not only disabled workers but their entire families because they are affected by occupational disease because their energies and wisdom are needed.

FURTHER: That-The Breath of Life Organizing Campaign should distill from all the workshops held at this Congress a Peoples' Platform which all Associations will utilize in explaining the Breath of Life Organizing Campaing to the people they organize.

WHEREAS: American Corporations have adopted the tactics of the "runaway shop";

WHEREAS: This tactic results in unemployment;

WHEREAS: This tactic has the effect of retaliating against workers' rights to raise issues of occupational safety and health, forcing them to choose between their jobs and their lives;

THEREFORE: Be it Resolved:
That-The Breath of Life Organizing Campaign will resist corporations who runaway from one community to another and beyond the borders of the United States of America.

FURTHER: That-The Breath of Life Organizing Campaign will fight for mandatory retraining of all displaced workers.

FURTHER: That-We will reach out to working people in other countries to warn them of the dangers that they face.

WHEREAS: The Breath of Life Organizing Campaign seeks to reach out to and unite all disabled workers;

THEREFORE: Be it Resolved:
To-Establish a central registry of disabled working people throughout the United States.

WHEREAS: Occupational disease is a major public health problem;

WHEREAS: Public health institutions at the local level by and large neglected the plight of the occupationally disabled and those working at risk;

WHEREAS: Workers at risk must have the right to know the hazards that exist on the job;

THEREFORE: Be it Resolved:
That-The Breath of Life Organizing Campaign will work for outreach programs around occupational health utilizing public health institutions and involing our own members in outreach.

WHEREAS: Thorough and aggressive education of workers about the aims and work of the Breath of Life Organizing Campaign is among the fundamental goals of our coalition;

THEREFORE: We Resolve:
To-Prepare audiovisual materials for use by BLOC member groups throughout the country.

WHEREAS: All disabled workers find common ground in their oppressive and malicious treatment at the hands of government agencies;

WHEREAS: BLOC represents the interests of all disabled workers;

THEREFORE: Be it Resolved:
To-Formulate and publicize a comprehensive guide to compensation programs.

FURTHER: To-Make this manual available to Breath of Life member Associations.

WHEREAS: We recognize the fact that unions are necessary and vital organizations of working people;

THEREFORE: Be it Resolved:
That-We welcome their support and encouragement of our struggle and will lend our support to their efforts on behalf of the health and safety of their members.

WHEREAS: The worker on the job is the first victim of industrial pollution and whereas this pollution then invades the community at large through such toxic agents as PCB, asbestos, benzene, VBC, etc.;

THEREFORE: Be it Resolved:
To-Reach out to others who are struggling against industrial pollution.

RESOLUTION ON ALABAMA SHIPYARD STRIKE

WHEREAS: Freedom from occupational hazards has traditionally been the last right won in negotiation and the first right conceded;

WHEREAS: The major issue in the strike of IUMSWA, Local 18, Mobile, Alabama, against Alabama Drydock and Shipbuilding Company (ADDSCC) and Doran Propeller Company, is job interchangeability which is inextricably tied to the safety and health of shipyard workers;

THEREFORE: Be it Resolved:
That-BLOC endorses the Local 18 strike and applauds the membership of Local 18 for its commitment to safety and health in the work place.

FURTHER: That-All this Congress of Disabled Workers encourages all member associations to vigorously support the strike.

RESOLUTION SUPPORTING MARCOS JUAREZ

WHEREAS: Marcos Juarez, former President of Ironworkers at the National Steel and Shipbuilding Company in San Diego, California, was fired by National Steel for his activities on behalf of San Diego shipyard workers;

THEREFORE: Be it Resolved:
That-BLOC call on the National Labor Relations Board to reinstate Marcos Juarez to his job at NASSCO.

RESOLUTION SUPPORTING FRED CARTER

WHEREAS: The federal government has attacked and is railroading Fred Carter, Vice President of the National Black Lung Association;

WHEREAS: This attack is an attack on all Black Lung, White Lung, and Brown Lung programs;

THEREFORE: Be it Resolved:
That-This conference go on record in support and defense of Fred Carter.

RESOLUTION REGARDING A CALL FOR THE NEXT CONVENTION

WHEREAS: It is our observation that this First Breath of Life Congress has achieved its stated objectives and goals;

WHEREAS: It is our observation that the brothers and sisters of all three organizations have met, accepted one another, and demonstrated a close commitment to change the conditions of misery and death that currently prevail;

WHEREAS: This body has demonstrated its desire to form a working class response to the government and corporate oppression of our people;

THEREFORE: Be it Resolved:
That-This political action committee charges the Board of Directors of BLOC to meet and plan our next convention no later than one year from this date if at all possible.

FURTHER: That-Any and all disabled people victimized by this oppression be called on to attend the next congress.

FURTHER: That-Our brothers and sisters from other parts of North America, South America, Europe, Asia, and Africa are invited to our next congress--the Canadian textile workers, the Mexican cement pipe workers, the African miners of South Africa--to cite a few examples.

Senator DOLE. Our next witness is Kenneth Feinberg, general counsel, representing Raymark Corp., accompanied by Mr. Sims, vice president, secretary and general counsel of the Raymark Corp.

STATEMENT OF KENNETH R. FEINBERG, WASHINGTON, D.C., COUNSEL, RAYMARK CORP., ACCOMPANIED BY ROBERT B. SIMS, VICE PRESIDENT, SECRETARY, AND GENERAL COUNSEL, RAYMARK CORP.

Mr. FEINBERG. Thank you very much, Senator. I am accompanied today by Robert Sims, and I would ask permission to reserve a little time at the end of my testimony and let Mr. Sims also make a few comments.

Senator DOLE. Well, you know the rules. We welcome you back.

Mr. FEINBERG. I was just going to say, Senator, that as a former staff member who spent some time in the back chairs, I know the advantages of an oral summation and will ask that my written statement be submitted.

Senator DOLE. I have tried it both ways, and sometimes the oral summation is longer than the written statement. [Laughter.]

Mr. FEINBERG. In my case, perhaps, but I hope not.

Senator, let me just, if I may, make a few brief points. I think it is important to understand the common thread which underlies the chapter 11 filings of three companies, the two proposals to amend the bankruptcy law which are now pending before your subcommittee, and the various proposals for an independent legislative solution outside of bankruptcy.

I think the common thread is a recognized, tragic breakdown in the tort system. That is what binds all of these proposals together for consideration; that the existing system simply takes too long to pay worthy claimants what is rightfully theirs.

And when you raised a few minutes ago the question of transactional costs, I think that there is a failure to respond adequately to the problem of what it costs to get recovery into the hands of a worthy claimant.

I think Congress must do something about this problem, or sooner or later other companies may face the same problem that these three companies face now in chapter 11.

You have been out front in so many important issues, Mr. Chairman, across the wide spectrum of public policy. Raymark and other nonchapter 11 companies look to you for some help in trying to resolve this dilemma.

There are, I think, two related problems. On the one hand, how do you make sure that companies will not be financially strangulated by this protracted litigation which is projected into the year 2000?

Although the number of future cases is ambiguous—how many there will be during the next two decades—I think this ambiguity itself breeds an uncertainty when it comes to corporate financial planning, capital formation, and the ability of companies to face the future. This is one dilemma that industry faces if we do not do something.

There is a second important issue as well, and that is—and you raised it, Mr. Chairman, in your statement—how do we make sure that there will be sufficient assets available in the future to pay claimants? I listened with great interest to the plaintiffs panel. But who speaks for the future claimants? There is no one here today speaking for claimants who, if something is not done, may be unable to receive compensation which they are entitled to in the years ahead.

One further point: past recriminations avail the Nation very little in terms of developing a long-range solution to the problem. This is a historical problem. Recriminations are very important if you are litigating cases and the question is fault, but if you are trying to develop an administrative, no-fault remedy for prompt payment to worthy claimants, recriminations do very, very little in helping resolve that problem.

May I conclude by suggesting, Mr. Chairman, that the two bankruptcy proposals before this committee are very interesting and innovative. They have a lot of merit to them. There are also many questions raised by them which I point out in my statement.

May I also suggest that a comprehensive solution to the problem of paying claimants now and in the future should consider a few basic first principles: prompt payment; certain payment; adequate payment; a no-fault worker's compensation approach—that is, an administrative, no-fault mechanism; contribution by all responsible parties to a trust fund to pay out claims under some sort of objective formula; and no new Federal bureaucracy that will simply slow the process down.

We are eager to work with you, Mr. Chairman. We all know of your role in countless other areas, and we look again to you for some help in trying to come up with some no-fault, administrative solution, in or out of bankruptcy, that will help get the money to worthy claimants.

I would ask Mr. Sims to just say a few words.

Senator DOLE. Mr. Sims?

Mr. SIMS. Mr. Chairman, we are not in chapter 11. We hope we will not be in chapter 11. We have no present intention of being in chapter 11, but look at the dilemma facing us.

The present system of litigating thousands of asbestos lawsuits is painfully inadequate, and the problem is aggravated by the bankruptcy filings of some defendant companies. It takes years for cases to come to trial. Defense costs are slowly strangulating defendant companies. The availability of insurance is uncertain and the subject is currently the basis of litigation.

Many worthy plaintiffs, fearful that there will be more chapter 11 filings, are rushing for quick settlements. It is estimated that the ratio of defense costs to awards is about 1 on 1, and that plaintiffs receive, net, only about 33 cents of every dollar paid in their behalf. Lawyers are the prime beneficiaries of this litigation.

If more defendant companies go into bankruptcy, the burden on the remaining defendants escalates. If defendants' resources dry up, who will pay the damages of worthy future plaintiffs?

Therefore, we are looking to you and to the Congress to help plaintiffs and defendants alike solve a real problem either through the bankruptcy system, so long as that approach does not put us, in effect, into chapter 11, or preferably by separate occupational disease legislation which is currently being considered.

Thank you for giving Raymark the opportunity to appear.

Senator DOLE. Thank you very much to both witnesses.

Mr. Feinberg, has Raymark formally entered the Manville bankruptcy proceedings?

Mr. SIMS. We have not formally done so. We are working with committees of litigants in that bankruptcy proceeding.

Senator DOLE. Does Raymark have insurance coverage?

Mr. SIMS. That is a question which is being litigated. We basically have insurance to some degree, but there is a debate going on which you may be aware of concerning what the definition of an "occurrence" is to determine whether, in fact, there is an exposure or manifestation definition. If, in fact, exposure proves to be the law of the land, you have certain types of insurance. If manifestation proves to be the law of the land, it may turn out that you have got a whole different body of coverage.

It is really a question of what type of coverage the companies have purchased over the years. We are looking for a broader based coverage, which has been the subject of a significant amount of litigation and also press publicity.

Senator DOLE. How many suits have you had filed against you?

Mr. SIMS. We have approximately 11,000 individual cases, and about 13,000 individual plaintiffs in those cases.

Senator DOLE. And how many have you settled or litigated?

Mr. SIMS. We have gone through trial in about 35 of those cases. Our record is 50-50, wins to losses. We have settled probably somewhere close to 1,000 cases.

Senator DOLE. And of the amounts paid out, do you have an estimate of how much went for attorneys and witness fees and court costs?

Mr. SIMS. Of the amounts paid out overall, we guesstimate that about $22 million went for various parts of the defense effort, and about $7 million went for indemnification. That was our individual share. In terms of what the carriers paid, the rate is a lot higher. I cannot really speak to that issue. But the ratio for our experience so far is about 3 to 1, defense costs to actual indemnification.

Senator DOLE. So for every $3 you would pay for defense, you would pay $1 to the victim?

Mr. SIMS. That is correct.

Senator DOLE. It seems to me we ought to find a better system than that.

Mr. SIMS. Well, that is what we are hopeful we will be able to come up with.

Senator DOLE. I assume that this may be a rather basic question, but sometimes the basic questions might be helpful. Has there been any effort by all the people involved in these things to sit down and try to come up with some——

Mr. SIMS. There have been a number of efforts. Unfortunately, the individual interests of the defendants on the one side and the plaintiffs on the other are not all that easy to reconcile.

As was mentioned earlier, there are a number of different products that are involved in this litigation, and each company claims that its particular product was not the cause of the problem. Consequently, the only way that we have been able so far to resolve the issue of fault is through the system of products liability litigation, where you go through the pretrial and trial stage and attempt to ascertain fault and liability.

Mr. FEINBERG. One solution might be, Senator, to have all of the defendant litigants get together and, based on their litigation exposure today—how many cases each one is involved in—contribute to a common fund to pay out to each claimant who has a disease a certain amount, which would be supplemental to anything they receive under worker's compensation today. This would not be a substitute for such compensation; it would be an additional amount.

In return, stop the tort litigation which is inundating the courts. Whether we can do that voluntarily is doubtful. That is what we have tried over the last few years, to try and secure a voluntary solution. Perhaps a legislative solution would create some sort of superfund trust fund which would quickly promote payments. For example, anybody who is certified by a workers' compensation panel in Kansas or Massachusetts, that you have an occupational disease, would send that certification to the fund and it would send you a check as a claimant, without any further demonstration of disease.

That is the line we are thinking about and we would hope that you might be interested as well in something similar. Such an approach eliminates the transactional costs and guarantees a funding pool available for not only the 16,000 claimants who have filed already, but those unknown numbers of future claimants who may not find a company around from which to secure any compensation.

Senator DOLE. Well, certainly, if we could find what most people believe to be a fair way to proceed, Congress would have some leverage. There has got to be some way.

You have litigated or settled 35 cases out of how many?

Mr. SIMS. About 12,000. We estimate it takes probably 4 to 5 years for a case to come up to trial.

Mr. FEINBERG. And this is just asbestos. The one additional facet that you will certainly be focusing on next Congress is the broader question—it may be asbestos today, but there is the broader question of other occupational diseases and toxic tort compensation. Senator Stafford has already introduced a bill. This obviously is going to be a key issue in the next decade for the Congress to address, and now seems to be a logical time for the Congress to begin to focus its attention on asbestos and other diseases as well.

Senator DOLE. Well, thank you very much and, again, we may want to submit some written questions as we go down the road on this.

Mr. FEINBERG. I hope I am still an alumnus in good standing, Senator.

Senator DOLE. You are an alumnus, and I hope I am in good standing. There is nobody else here but me, so I am in good standing. [Laughter.]

[The prepared statement of Mr. Feinberg follows:]

STATEMENT OF
KENNETH R. FEINBERG
ON BEHALF OF
THE RAYMARK CORPORATION

Mr. Chairman:

My name is Kenneth R. Feinberg. I am a member of the Washington law firm of Kaye, Scholer, Fierman, Hays & Handler and am here representing the Raymark Corporation of Trumbull, Connecticut. Accompanying me at today's hearing is Robert B. Sims, Raymark's Vice President, Secretary and General Counsel. Raymark is a multinational manufacturer and marketer of energy absorption and transmission products, fastening systems and custom-engineered materials. These products are used in the automotive, aerospace, farm implement, earthmoving, construction, appliance, hardware, mining, petrochemical and electric utilities industries. Although Raymark's million-dollar research effort has enabled it substantially to reduce its reliance on asbestos, there are some applications where no acceptable substitutes have yet been found; like other asbestos-related companies, Raymark has been confronted with a deluge of litigation.

I want to thank this Subcommittee, and you in particular Mr. Chairman, for extending this opportunity to testify concerning the unique problems associated with the recent filings under Chapter 11 by the Manville Corporation, UNR Industries, Inc. and Amatex Corp.

Mr. Chairman, the Chapter 11 filings have greatly compounded the uncertainties of an already difficult situation. The filings raise important and difficult bankruptcy law issues. But it is important to recognize at the outset that these issues -- although critical -- are only part of an even more important, more difficult and more fundamental question: how best to compensate the victims of asbestos disease. Pending proposals to amend the bankruptcy law share with more comprehensive legislative initiatives the recognition -- made apparent by the Chapter 11 filings -- that the existing tort litigation system has broken down when it comes to asbestos disease compensation.

Mr. Chairman, we urge you to consider any proposal that would resolve this national problem; but we know of one "solution" that will not work -- and that is the simple perpetuation of the existing asbestos litigation. To continue "business as usual," to refuse to acknowledge the depth of the existing crisis, is to delay the day of reckoning and raise the very real possibility that worthy claimants will be denied compensation. Congress must act soon, or other companies may have little choice but to follow the path staked out by Manville, UNR and Amatex. Proof of the breakdown of the existing tort litigation system can be found in the delay that worthy asbestos claimants must endure, in the large variations in their recoveries, in the disputes that delay the receipt of insurance indemnity for which the asbestos manufacturers contracted and in the enormous drain on our national resources that the whole problem has produced. The system has failed the claimants, the manufacturers, and the insurance industry, but it has also failed the courts and brought home to the citizens of our Nation that valid asbestos disease claims are no guarantee of adequate recovery. As appropriate as tort litigation may be in other contexts, it simply cannot cope with the unique and complex problems of compensating asbestos disease victims.

From the perspective of those with valid claims, of course, litigation unduly delays justified compensation. Asbestos claimants suffer when issues of fault and ultimate responsibility must first be resolved in the courts. In addition, litigation is always a gamble. This is as true for the manufacturers and insurers as it is for the claimants. The outcome of a lawsuit can never be predicted with any accuracy; the by-product is a pervasive uncertainty that threatens claimants' recoveries, causes accountants to qualify financial statements and prevents sound financial planning. Such litigation also produces inequities. Sheer happenstance of work location, residence, or lawyer's skills may be the critical factor in deciding whether a claimant receives a $500,000 award or nothing at all. And even when the same law is applied, different judges and juries often reach different conclusions on the same facts. Moreover, all these problems are magnified by the sheer number of asbestos-related cases now clogging our courts.

Most importantly, massive tort litigation generates huge legal and administrative expenses for all parties to the particular dispute. For every dollar that is paid to an asbestos claimant, the manufacturer pays at least another dollar in legal and other expenses. And for every dollar that a claimant is awarded, he or she actually realizes as little as ten or twenty cents. The remainder goes to pay the expenses and costs of the law suit!

Disputes among insurers and manufacturers have further aggravated costs, both by delaying the manufacturers' indemnity for thousands of dollars of valid claims and by again generating legal expenses. Nor is the American taxpayer immune from this growing legal morass. Tax dollars, too, have been drawn into the vortex -- to staff and administer the courts where the tragedy has unfolded.

All these expenditures have diverted resources that could be used to compensate disease victims. Furthermore, and perhaps more importantly, they have seriously strained the assets available to pay tomorrow's disease claimants. It does not require much foresight to realize that the existing situation cannot long continue without some form of decisive action being taken.

Mr. Chairman, if evidence were needed to demonstrate the true nature and scope of the crisis you have it now; the absence of a national policy to deal with this crisis has already forced three companies into Chapter 11. The problem cries out for a speedy national response. But to dwell upon history -- to point the finger of blame in an effort to allocate responsibility for the crisis -- is not the constructive response that the problem demands. Recriminations are no comfort to the worthy claimant and only aggravate the tensions that cloud judgment and prevent cooperation. The time has come, instead, for a serious, bipartisan effort to resolve the underlying problems. Chapter 11 must surely be viewed as a last resort -- I know of no other asbestos company that now plans to follow that route -- but the pressures for filing under Chapter 11 are substantial and continue to multiply with each additional Chapter 11 filing.

This brings me to the specific area in which this Subcommittee has expressed the greatest interest -- the impact of the recent bankruptcy filings on the other asbestos related companies who are joint defendants in the ongoing tort litigation. As you know, asbestos plaintiffs typically name not just one, but a whole host of companies as defendants in their suits. This is in part because the source of specific asbestos products cannot be ascertained many years later and also because product liability law imposes liability on all companies in the product's chain of distribution. When one defendant drops out of these cases, the remaining co-defendants may have to "pick up the slack;" each new defendant that "disappears" increases proportionately the financial risk that a remaining co-defendant must bear.

A bankruptcy filing, of course, is a form of "disappearance." The filing itself automatically stays both the bringing of new suits and the prosecution of old suits against the filing company. This protection against suit continues at least temporarily and possibly as long as the bankruptcy proceeding continues. Whether any similar protection is available to non-filing co-defendants in existing cases is unclear; this is an issue that is now being sharply contested with conflicting results.*

What is clear in the wake of the bankruptcies is that the non-filing companies will not be protected from the continuing onslaught of new litigation -- and will be forced to assume an increased responsibility for the outcomes in these new cases. In addition to the approximately 12,000 pending lawsuits, asbestos disease cases are now being filed at the rate of 300 to 400 a month. The mere unavailability of one or two defendants is not likely to stem the tide. As already indicated, the non-Chapter 11 companies may have to pay the entire settlements and judgments in these cases. In addition, they will also have to bear the entire defense expenses, without the assistance of the Chapter 11 companies. To further aggravate the problem, the non-Chapter 11 companies, once having paid the judgment or settlement, might not be able to obtain contribution from those who have elected to file under Chapter 11.

---

* See, e.g., Austin v. Unarco Indus., Inc., No. 82-1168 (1st Cir. Aug. 5, 1982), Asbestos Lit. Rep. 5443 (granting stay of appeal); In re Rhode Island Asbestos Cases, RIML-No. 1-P (D.R.I. Oct. 12, 1982), Asbestos Lit. Rep. 5748 (Oct. 22, 1982) (denying stay); Dellamo v. Keene Indus. Insulation, No. 100(1) (Phil. Ct. Comm. Pleas Sept. 24, 1982), Asbestos Lit. Rep. 5654 (Oct. 8, 1982) (denying stay); In re Related Asbestos Cases, No. C-79-3588 (N.D.Cal. Sept. 15, 1982), Asbestos Lit. Rep. 5622 (Sept. 24, 1982) (denying stay); In re UNR Indus. Inc., Nos. 82-B-9841-51 (Bankr. N.D.Ill. Sept 15, 1982), Asbestos Lit. Rep. 5612 (Sept. 24, 1982) (denying stay); Clutter v. Johns-Manville, No. C-78-1229 (N.D.Ohio Aug. 2, 1982), Asbestos Lit. Rep. 5374 (Aug. 13, 1982) (granting stay) (transcript of hearing, but not order, reported in Asbestos Lit. Rep.); Bowman v. Johns-Manville, No. C-2-81-1492 (S.D.Ohio), Asbestos Lit. Rep. 5554 (Sept. 10, 1982) (granting temporary stay); Doan v. Johns-Manville Corp. No. 008534 (Ohio Ct. Comm. Pleas Aug. 13, 1982); Asbestos Lit. Rep. 5452 (Aug. 27, 1982) (denying stay).

According to an affidavit of Edward D. Tanenhaus, Associate Counsel to GAF Corporation, filed in support of an application by a number of co-defendants for relief in the bankruptcy court, "approximately thirty-five [courts that have considered the effect of the Manville filing] have postponed trials or completely stayed cases . . . pending further developments in the Manville Chapter 11 case, [and] [t]wenty-two courts have ordered the parties to proceed without Manville." Affidavit of Edward D. Tanenhaus in Support of Plaintiffs' Motion for Summary Judgment, Nos. 82-B-11656 through 82-B-11676 (Bankr. S.D.N.Y. Oct. 27, 1982).

Unless Congress acts, there is a very substantial risk that the liabilities and costs of the current litigation -- and, more importantly, all aspects of the future litigation -- will be shifted to the backs of the non-filing companies. If that happens, the prospect of Chapter 11 inevitably will be more closely examined by the remaining companies. These companies will be confronted with a disagreeable, unwelcomed, Hobson's choice -- to remain one of a dwindling number of asbestos defendants shouldering increased financial risks or to follow the road taken by their co-defendants who have opted for Chapter 11.

In the bankruptcy law area, at least two interesting proposals have been widely circulated in recent weeks to deal with this dilemma: first, a limited proposal to extend to co-defendants of Chapter 11 companies the protection afforded by the Bankruptcy Code's automatic stay; and second, a more expansive proposal to consolidate in a single bankruptcy court some or all of the asbestos litigation issues. Each proposal has merit and should be carefully considered as an alternative to the unacceptable existing situation. Neither proposal, however, is entirely free from difficulties.

The basic idea underlying the more expansive proposal, as I understand it, is to resolve in a single, federal forum, many of the existing asbestos disease issues. The proposal is imaginative and intriguing, but is also incomplete. Its chief virtue lies in its recognition of the need for a concentrated, comprehensive solution to the entire problem of compensating asbestos disease. The proposal suggests a type of consolidation that may offer a number of possible advantages -- at least in terms of reducing the inequities and financial uncertainties of the current situation. An important aspect of the proposal is that it could provide a means for prompt and final resolution of claimant and insurance disputes that have left all of the parties in financial limbo. Another attractive feature of such a proposal is that it might be an appropriate vehicle for developing acceptable financial contribution formulas for the payment of claims by the various manufacturers. And all of this could be accomplished at the same time that the cost of litigating asbestos claims is substantially reduced.

None of these possible advantages is assured, however; the proposal is just that -- a proposal designed to foster debate and innovative thinking. It is new and interesting, but lacks the detail needed to weigh its overall merits. An especially worrisome aspect of the proposal, from the perspective of Raymark, is the possibility that it would "marshal" the co-defendants' assets in the bankruptcy court. What all this means is unclear, but Raymark is understandably concerned that it not be statutorily thrust into involuntary bankruptcy -- especially without the usual protections afforded both creditors and debtors.

A second area of ambiguity in the proposal is the question of how existing claims would be resolved in the bankruptcy court. A single bankruptcy court could not conceivably be asked to adjudicate the many thousands of individual claims now pending in the courts on a case-by-case basis. Given the existing state of confusion surrounding state law determinations of liability and contribution in these cases, I assume that the proposal contemplates that uniform no-fault standards of liability and remedies would be adopted, to be implemented by the bankruptcy court according to some agreed-upon administrative scheme.

I recognize that these concerns, although real, are premature. Such a proposal -- properly fleshed out -- might offer the kind of comprehensive solution that the problem requires. Certainly every comprehensive proposal deserves serious consideration; but the kind of proposal that I have described must be further developed before its merits can be fully assessed.

A second proposal that has been circulated in recent weeks would extend the Bankruptcy Code's automatic stay of litigation to the co-defendants of the asbestos companies that have already filed under Chapter 11. I should point out, Mr. Chairman, that the language which has found its way into the draft amendments -- and I refer here to Sections 320 and 321 of the draft provided me -- would not appear to accomplish such an extension of the automatic stay: first, it would not appear to apply to the co-defendants of those Chapter 11 companies who filed before passage of the proposed amendment; second, it would confer discretion on the Bankruptcy Court only to "grant relief" from the automatic stay. The language would not - at least expressly -- mandate extension of the stay to a debtor's co-defendants.

Some type of stay extension is an idea that has much to commend it, but such a measure should only be part of a more comprehensive solution to the crisis. An expressly authorized, narrowly framed stay of the litigation would permit Congress the time it needs to address the underlying problems while preserving the status quo among the litigating parties. An interim stay of the litigation might, perhaps, also permit the interested parties to resolve their differences without additional Congressional intervention, for example, through arbitration or some alternative dispute resolution process. In any event, such a stay would postpone, if not fully avert, the potentially disastrous shifting of liabilities to the remaining non-Chapter 11 companies. For these reasons, the idea is worthwhile.

In evaluating the merits of imposing a stay, one must respond to a major criticism directed against it by the plaintiffs' bar -- that such a stay is inherently unjust because it places the burden of resolving the crisis on the backs of the current plaintiffs who cannot afford the delay.

I am sympathetic to this criticism but believe that it is short-sighted and not in the best interests of claimants as a whole. No one wants to delay payments to deserving claimants. Uncontrolled litigation, however, by draining the assets of the remaining companies, will benefit successful existing plaintiffs at the expense of future claimants. Who speaks for those *future* claimants who may look in vain for a defendant company to bear the responsibility for compensating them? A specific and limited extension of the automatic stay will benefit those future claimants, and will also avert potential disaster for the remaining defendant companies.

Perhaps an acceptable "bankruptcy court" solution to the asbestos litigation crisis can be developed that would meet the concerns of all interested parties. At the same time, however, other proposals are also being informally discussed that might satisfy everyone's concerns. Representatives Miller and Fenwick and Senator Hart have recognized the need for a comprehensive solution in this area and have been in the vanguard in educating Congress concerning the entire problem. Their ground-breaking efforts deserve the Congress' immediate and close attention. We are eager to explore these or any other proposals that might be advanced in the coming months, if they can offer a fair, workable solution to the tragic breakdown of the existing tort litigation system. A comprehensive, fair and equitable solution can be fashioned, but the solution demands a spirit of close cooperation and bipartisan consensus, both within the Congress and among those who are most immediately affected.

It is in this spirit that the Raymark Corporation, as a member of the Asbestos Compensation Coalition, has analyzed the various legislative proposals already made and offered suggestions for the development of an equitable, financially sound and politically viable solution.* Although Raymark acutely recognizes the need for flexibility, and is not wedded to specific concepts, it believes that any proposal must meet several fundamental objectives, if the underlying problems are to be fully resolved:

- First, any new program must be designed to pay an adequate benefit.

- Second, claims must be processed and paid promptly. A comprehensive solution must eliminate delays.

- Third, claims must be determined on a no-fault basis if the enormous cost and delays of the present system are to be avoided.

- Fourth, the new program must eliminate third-party tort litigation and provide an exclusive remedy. Unless the program operates as a substitute for current tort litigation, the existing problems will continue and new delays and inequities will result.

---

* *See* Statement of the Asbestos Compensation Coalition submitted to the Subcommittee on Labor Standards, Committee on Education and Labor, U.S. House of Representatives (September 9, 1982); Letter from William C. McLaughlin to Hon. George Miller (May 4, 1982); Statement of Asbestos Compensation Coalition before the Subcommittee on Labor Standards, Committee on Education and Labor, U.S. House of Representatives (April 21, 1982).

- Fifth, all responsible parties -- including the manufacturers, their insurers and the federal government -- should contribute to the program's funding.

- Sixth, the parties' respective financial contributions must be based on specific, objective criteria that permit sound financial planning. Uncertainties must be minimized.

- Seventh, each party's contribution must equitably reflect its share of responsibility for the underlying problem.

- Eighth, new government spending -- to the extent it is not associated with government contribution to compensation -- should be strictly limited.

- Ninth, the creation of new bureaucracy must be avoided.

- Tenth, the program must be manageable -- with a minimum of administrative costs or intervention in existing programs.

Agreement on these basic objectives will provide the foundation for a comprehensive solution to this national tragedy. Any proposal that meets these objectives should be promptly and thoroughly considered by the Congress. In the meantime, however, Congress should act on an emergency basis to prevent the situation from further unraveling while a comprehensive solution is fashioned.

On behalf of the Raymark Corporation, I urge this Subcommittee to act promptly and to work with other relevant committees in developing appropriate legislation. We will be happy to provide any background information or other assistance that you may need.

I would be pleased to answer any questions you may have.

Senator **Dole**. Our final witness with reference to the first portion of our hearing is Eugene Anderson, representing the Keene Corp., a codefendant with Manville.

STATEMENT OF EUGENE R. ANDERSON, COUNSEL, THE KEENE CORP., ACCOMPANIED BY ARTHUR OLICK

Mr. **Anderson**. Mr. Chairman, I welcome the opportunity to appear before you. I am accompanied by my law partner, Arthur Olick.

I will not follow my written statement. I will try to get through in the time scheduled to enable you to get to your luncheon. I would note for the record that most of the people in the room were in knickers when these letters that were displayed were written. I was trying to think of whether I could milk cows then or not, and I do not think I was quite able to make that grip at that early stage of my career.

Senator **Dole**. I was just thinking, looking around the room, most of the people were not anywhere. [Laughter.]

Mr. **Anderson**. I think that is correct.

Johns-Manville was and is the world's leading miner of raw asbestos. It is in the asbestos business today at every level. When these personal injury lawsuits started in the late 1960's, Johns-Manville was the principal defendant. Manville decided to cut its losses by dragging other companies into the litigation, including its customers, and Keene was one of those customers.

Keene was formed in 1967. In 1968, it bought a small manufacturer of asbestos pipe insulation. If you have been inside a battleship and you see every pipe is covered, that is what we are talking about. That pipe insulation, as manufactured by the company that Keene bought in 1968, had about 7 percent asbestos fiber in it.

Keene is typical of many of the 200 companies that are involved in the asbestos litigation. Despite about a 4-year involvement with asbestos from 1968 until 1972, Keene has been sued in over 14,000 lawsuits. We have settled about 3,000 of those at a cost of approximately $9 million. We have tried about 25—by the way, the $9 million includes judgments on trials.

Of the approximately 25 cases that have been tried, we have won more than half of those cases after trial. New cases are coming in against Keene at the rate of 300 a month. Most of the insurance companies covering Keene, Manville, Raymark, ran for the hills. There are about a dozen insurance coverage lawsuits pending around the country at the present time, including Manville's in California.

Keene won a case in the U.S. Court of Appeals for the District of Columbia Circuit against the primary carriers which, in effect, held that insurance means insurance. The other defendants in these cases are trying to get the same kind of result.

It has been commented here that there are four divergent insurance coverage decisions. That is false. In every single insurance coverage case involving asbestos, the court has held that insurance means insurance. And when the asbestos fabricator or manufacturer told the court what its problems were, the court said, with very minor variations, "if that is what your problem is, that is what your insurance covers."

I have prepared an article for publication in Best Insurance which talks about these four cases, due to be published very shortly, and I would like to submit a copy of that for the record. It is not in publication; I will get you our manuscript copy.

Senator DOLE. We will be pleased to have that.

Mr. ANDERSON. I want to underscore one thing that has been said earlier, and that is that the U.S. Government is also involved in the asbestos cases. The U.S. Government sold asbestos; the U.S. Government required the use of asbestos. The U.S. Government purchased it; the U.S. Government set workplace standards, and the U.S. Government has a responsibility.

It is very tough to be in Keene's situation, buying a company in 1967, long after World War II is over, and be paying the delayed cost of the World War II production effort. Unless Congress acts quickly and decisively, we believe there are going to be further bankruptcies.

While I do not think Keene is at risk, bankruptcies are not the answer to the stories that you heard this morning from the daughters and widows of persons injured by asbestos. There has to be a compensation scheme developed on a national, comprehensive level that will provide compensation to the people who have been injured, and will sort out the meritorious claims from the unmeritorious claims.

I do not think that there are venal people in very many areas of this asbestos litigation, but the transaction costs about which Mr. Feinberg spoke, in our experience, are that it costs 80 cents to deliver 20 cents to the people injured, and the 20 cents gets there 4 or 5 years too late. That is just plain wrong.

We have several suggestions relating to the bankruptcy laws which are under your jurisdiction. We believe that the automatic stay provisions in section 362 should be extended to include all of the codefendants in the cases to give the bankruptcy court an opportunity to formulate a plan comparable to the resolution of class actions that would provide a compensation that would be fair, equitable, and speedier than the present plan.

Senator DOLE. Are some of your cases stayed now?

Mr. ANDERSON. Your Honor, about 60 percent of the cases against Keene are stayed at the present time, and about 35 percent of them are not. Now, in the 65 percent, I would say that some of the judges have said, "Well, I will wait 30 days." One of them said, "I will wait until January."

I believe those figures are in Mr. Feinberg's statement. If they are not, I can submit to you a comprehensive, about 5- or 6-page summary of how those stays stand.

Senator DOLE. I think they are in Mr. Feinberg's statement. He is indicating they are.

Mr. ANDERSON. Now, I think that the bankruptcy code should provide that cases involving debtors can be removed from State and Federal courts into the bankruptcy court in which the debtor's proceedings are pending, so that there can be a rational and comprehensive solution.

Finally, with respect to asbestos, we would urge that the bankruptcy courts be given the authority to create the equivalent of a superfund to which contributions would be made the debtor, by codefendants that chose to opt in, and by the insurance companies covering the debtor and the codefendants.

Senator DOLE. And the Government?

Mr. ANDERSON. And any other responsible party. The Government is already codefendant in these cases.

I believe that a superfund will reduce the transactional costs, and I would call your attention to the fact that the transaction cost in the Social Security Administration, which is tarred for being a huge Government bureaucracy with lots of costs—for social security, it costs 2 cents to deliver 98 cents.

And the thing that we have to do in the asbestos litigation is to get the 80-cent cost down closer to the 2-cent cost.

I would be glad to answer questions particularly about insurance. I appreciate the opportunity to appear before you. Keene's resources, our firm's resources, and the resources of many of the other codefendant's are available to the committee and to the staff to attempt to work out a reasonably comprehensive solution to a terrible public health crisis.

Senator DOLE. What is Keene's share of the asbestos market?

Mr. ANDERSON. Your Honor, there are several markets here that you have to look at. First is the mining market, of which Johns-Manville had about 75 percent. Keene was not in that market. The next market is the fabricating market, which Johns-Manville was in and Keene was in, and Keene probably had 5 or 6 percent of that market, or less.

The third market is the contractor's market—I think both Keene and Johns-Manville were in that kind of applicator's market—and I do not have an estimate of that.

[The following letter was subsequently received for the record:]

ANDERSON RUSSELL KILL & OLICK, P.C.,
ATTORNEYS AND COUNSELLORS AT LAW,
New York, N.Y., November 22, 1982.

Senator ROBERT J. DOLE,
Dirksen Senate Office Building,
Washington, D.C.

DEAR SENATOR DOLE: Reference is made to my testimony before the Subcommittee on Courts, Committee on the Judiciary, on November 10, 1982.

I very much appreciated the opportunity of appearing before your subcommittee and particularly thank you for your interest and attention.

One of the answers I gave to you was incorrect.

The market share of Keene's former subsidiary and its predecessors in the "fabricator's market" is much closer to 3 percent than the 6 percent figure I gave you. I regret the error.

Keene's former subsidiary and its predecessors were not miners of asbestos fiber.

Sincerely,

EUGENE R. ANDERSON.

Senator DOLE. Now, you say you have had in an appellate court a judgment against an insurance company?

Mr. ANDERSON. Yes, Your—I started to say "Your Honor." You will excuse me for being out of my usual forum.

Senator DOLE. That is all right. I was just thinking it might not be bad if there is an opening. [Laughter.]

I would say that we have asked the insurance companies to testify. They preferred just to submit statements in writing; they will be made a part of the record.

Well, again, I do not have any specific questions. With all the talent in this room on the legal side, it seems to me that somebody ought to be able to give us the solution that we can work on in the Congress. In addition to this committee's jurisdiction, we are all Members of Congress, too, and this is something that just begs for solution. Particularly with respect to the point that you have made, along with Mr. Feinberg and others, that the delivery cost is $4 for every dollar in benefits received by victims.

Social security is what, 2 cents?

Mr. ANDERSON. Yes. My understanding of social security is that it costs 2 cents to deliver 98 cents.

Senator DOLE. We have had some problems with that program too, but we will get into that tomorrow.

Well, we certainly are going to continue our discussions with those who have testified and others who have a direct interest in seeing that something is done very quickly. We will look forward to receiving the information you suggested you submit to us. Is the manuscript available now?

Mr. ANDERSON. Yes, I think that is available now.

Senator DOLE. I think the other questions I had as far as the number of lawsuits and the number you have settled and the number that have been stayed, you have responded to in your statement, so I have no further questions.

Mr. ANDERSON. We would urge that there be very rapid action because there is a potential domino effect here. If, as Mr. Feinberg and Mr. Sims hypothesized, you simply knock off one after another of these companies, eventually even Exxon will go down.

Senator DOLE. It really is a problem we must address, and I have counsel here and Senator Heflin has counsel, and hopefully in the next couple of weeks they can be discussing some reasonable approach with everyone who has testified, in addition to a number who have a direct interest who could not be here today or preferred not to be here today for reasons that are probably valid.

But that is the reason we are having the hearing prior to Congress coming back, to give us some time in the next 3 weeks to see if we cannot focus on three or four things we ought to try to do between now and the first of the year.

Thank you very much.

Mr. ANDERSON. Thank you.

Senator DOLE. Since the superfund question was raised, I would only say to the plaintiffs' attorneys and Johns-Manville and others who may be interested in the room, if they could submit comments in writing on at least that concept, it might be helpful to us, in the context of the bankruptcy proceedings.

Thank you very much.

Mr. ANDERSON. Thank you very much, Senator.

[The prepared statement and additional submissions of Mr. Anderson follow:]

Statement By
EUGENE R. ANDERSON
ANDERSON, RUSSELL, KILL & OLICK, PC
for
KEENE CORPORATION

Mr. Chairman:

I welcome the opportunity to appear before this subcommittee. I am here because Johns-Manville filed for protection under the bankruptcy code. Johns-Manville is, and was, the free world's leading miner of raw asbestos which it used and sold to others. Johns-Manville was in the asbestos business at every level, it still is.

When the asbestos personal injury cases commenced in the late 1960's, Johns-Manville was the principal asbestos defendant. Johns-Manville used the litigation tactice of cutting its losses by bringing others, including its customers, such as my client, Keene Corporation, into the litigation.

Keene Corporation, is typical of many small defendants in the asbestos cases. There are over 200 companies of various sizes involved in the asbestos litigation.

Despite Keene's very minimal involvement with asbestos, Keene has been sued in over 14,000 asbestos suits. New suits are coming in at the rate of over 300 per month.

Most insurance carriers have denied coverage for the asbestos lawsuits, and at least two dozen insurance coverage suits are now pending. The insurance industry has made a mockery of the concept of insurance.

The United States government is also a defendant in the asbestos cases. It is a supplier, specifier, consumer and promoter of asbestos products. Its involvement can not be underestimated or ignored.

That, Mr. Chairman, sets the stage for the issue we are discussing today. Unless Congress acts quickly and decisively, it is entirely possible that Keene and other small asbestos defendants could be forced to pay Manville's share of the damages in the asbestos cases -- a result, I am sure you agree, that would be manifestly unfair.

Manville has used the bankruptcy court to delay. Its failure to file a plan of reorganization heightens the possible domino effect, and, while I do not think Keene is at risk, additional bankruptcies may be inevitable.

The asbestos litigation crisis can only be resolved with the participation of Johns-Manville.

This committee has a unique opportunity to provide a mechanism for resolution of the asbestos problem which has already resulted in three bankruptcies.

In addressing the jurisdictional questions raised by Marathon, we suggest that the Bankruptcy Reform Act be amended in several respects:

(1) The Code should specifically provide that the automatic stay of cases under Section 362 may be applied in appropriate cases to co-defendants, particularly where the bankrupt is inextricably involved in the cases. This would forestall multiple bankruptcies;

(2) The removal provisions of the Act should be revised to provide clear authority for the direct and complete removal of any multiple defendant case involving a Chapter 11 debtor;

(3) Bankruptcy judges should be made Article III judges with the power to appoint special masters and try removed cases under the federal rules of evidence;

(4) The bankruptcy courts should be given the same powers as a federal district court to exercise jurisdiction over parties necessary to the resolution of cases, such as insurance carriers and, where appropriate, the United States government;

(5) The bankruptcy court should be given authority to establish a tort claimants' superfund, which would provide a mechanism for payment of both pre- and post-petition claims. Contributions to the superfund could be made by all co-defendants, their insurance carriers, and any other responsible party, in addition to contributions from the bankrupt's estate. The essential prerequisites to such a fund must include the authority to fully and finally release and discharge all contributors from both existing and future claims of asbestos related claimants. It is anticipated that efficient administration of such a fund would provide prompt, adequate relief to truly disabled claimants, eliminate the burden on the court system, and ensure that the majority of funds spent on the asbestos problem went to the claimants.

In conclusion, Mr. Chairman, I appreciate the opportunity to testify and we would be pleased to work with your staff and any other interested parties in developing language to implement our suggestions.

ANDERSON RUSSELL KILL & OLICK, P. C.
ATTORNEYS AND COUNSELLORS AT LAW
666 THIRD AVENUE
NEW YORK, NEW YORK 10017
(212) 850-0700

EUGENE R. ANDERSON
BARBARA PFEFFER BILLAUER
ANDREW P. BRIDGMAN
NICHOLAS L. COCH
ADRIENNE M. COFFIN
RICHARD W. COLLINS
JOHN E. DANIEL
JOHN H. DOYLE, III
ERICH R. EISELT
JAMES L. GARRITY, JR.
ROBERT A. GAYNOR
JOHN H. GROSS
JAMES P. HEFFERNAN
DONALD A. HERNER
MARCY LOUISE KAHN
R. MARK KEENAN
LAWRENCE KILL
LISA D. LEVEY

ROBERT M. MILLER
FREDERIC L. NEUSTADT
ARTHUR S. OLICK
JEROLD OSHINSKY
RANDY PAAR
STEVEN M. PESNER
ROBERT P. REICHMAN
C. KIRK RHEIN, JR.
DANIEL N. SAND
LAURENCE Y. SOLARSH
DAVID A. STRUMWASSER
LYNNE E. TROY
IRENE C. WARSHAUER
TINA L. WELLNER
NICHOLAS J. ZOOGMAN

JOHN C. RUSSELL
COUNSEL

ANDERSON BAKER KILL & OLICK
1600 K STREET, N.W.
WASHINGTON, D.C. 20006
(202) 466-7814

4800 SOMERSET DRIVE
PRAIRIE VILLAGE, KANSAS 66208
(913) 648-5535

TELEX
WU 12-7022
WUI 66513
(ARKO)

CABLE ADDRESS
"NEWERALAW NEW YORK"

TELECOPIER
(212) 850-0733

November 19, 1982

Senator Robert J. Dole
2213 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Dole:

During my testimony before the Subcommittee on Courts, Committee on the Judiciary, United States Senate, on November 10, 1982, two items were left open.

Enclosed is a copy of an article written by me and my partner, Lisa D. Levey, which will appear in the December 1982 Property/Casualty edition of Best's Review. In this article we show that the four insurance coverage decisions are all consistent. The standard comprehensive general liability insurance policies involved in the asbestos insurance coverage litigation insure against "legal liability". In Forty-Eight, Keene and Eagle Picher, the Courts of Appeals reached almost precisely the result sought by the policyholder. (The Porter case was a controversy between two insurance companies and therefore is not a decision of particular relevance.) I think it is quite inaccurate to state - as the insurance companies have done - that the Forty-Eight, Keene and Eagle Picher cases are at variance. This is more fully set forth in the attached article.

You asked me what the courts in the 14,000 asbestos cases had done with respect to the staying or continuation of proceedings as to parties other than Manville following the Manville bankruptcy: by our tally we find 48 jurisdictions which have recognized some sort of stay and 42 jurisdictions which have directed the actions to go forward without Manville.

Enclosed is a schedule dated November 15, 1982 giving a status report on stays and severances by jurisdiction.

Very truly yours,

Eugene R. Anderson

Eugene R. Anderson

Enclosure

bcc with enclosures

Richard Velde
James M. Stephens
Michael Goldberg

Progressive Injury Insurance Coverage -- Update

By Eugene R. Anderson and Lisa D. Levey*

Standard Comprehensive General Liability Insurance Coverage

Standard comprehensive general liability ("CGL") insurance coverage for cumulative trauma, progressive injury, long-term injury, insidious disease and continuing injury claims (as it variously has been described) has been the subject of many recent court decisions in the United States.[1] Broadly speaking, these decisions have been in favor of the policyholders.[2]

The Court of Appeals for the First Circuit recently decided Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co.[3] Because of the unique facts of that case, the Eagle-Picher decision is consistent with earlier rulings.[4]

---

* Eugene R. Anderson and Lisa D. Levey are attorneys with Anderson Russell Kill & Olick, P.C., New York, New York. Jerold Oshinsky and Sherry W. Gilbert, attorneys with Anderson Baker Kill & Olick, Washington, D.C., participated in the preparation of this article. The authors were counsel for Keene Corporation in Keene Corp. v. Insurance Co. of North America, infra, n. 16. The opinions expressed in the article are those of the authors and not necessarily those of any of their clients.

The Standard Comprehensive General Liability Insurance Policy Language Covers Legal Liability

The majority of the insurance policies at issue in the coverage cases are standard comprehensive general liability insurance policies[5] that contain uniform language prepared by insurance industry associations.[6] With minor variations which are not pertinent to this article, these policies provide coverage for legal liability, and state that:

> [t]he [insurance] company will pay on behalf of the insured [policyholder] all sums which the insured [policyholder] shall become legally obligated to pay as damages because of bodily injury . . . to which this insurance applies, caused by an occurrence, and the [insurance] company shall have the right and duty to defend any suit against the insured [policyholder] seeking damages on account of such bodily injury . . . even if any of the allegations of the suit are groundless, false or fraudulent. . . .

"Bodily injury" is defined in the policies as "bodily injury, sickness or disease sustained by any person." "[O]ccurrence" is defined as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury . . ."[7]

This standard policy language is significant because it sets forth both the trigger of coverage (*i.e.*, the event that requires an insurance policy to provide coverage for a claim) and the scope of the insurance company's obligations once its policy is triggered. The trigger of coverage under the standard CGL policy is injury during the policy period. Mr. Norman Nachman, the manager of the General Liability Division of the National Bureau of Casualty Underwriters, who was actively involved in the 1966 drafting of the standard CGL insurance policy, discussed the injury trigger of coverage in a published article:

> The definition [of occurrence] serves to identify *the time of loss for application of coverage* in these cases, viz, *the injury must take place during the policy period*. This means that in exposure-type cases, cases involving cumulative injuries, more than one policy contract may come into play in determining coverage and its extent under each policy.[8]

Once its policy is triggered, an insurance company is required to pay all sums which the policyholder is legally obligated to pay with respect to the underlying claim.

The Theories of the Trigger of Coverage

Despite the standard language of the CGL policies, different litigants have advocated various theories as to the trigger and scope of coverage. The insurance companies themselves promote different interpretations of identical standard policy language. While all of the litigants pay lip service to the proposition that coverage under the standard CGL policies is triggered by injury during the policy period (because that is what the policies expressly provide), they have advanced different constructions of when injury occurs within the meaning of the policy language.

The earliest constructions of bodily injury were advanced in the asbestos and DES coverage cases, principally by insurance companies, and were characterized broadly as the "manifestation" and "exposure" theories of coverage.[9] It is not possible to set forth precise definitions of the "manifestation" and "exposure" theories because they have been construed differently by different advocates.

For example, some parties have construed manifestation to mean diagnosis of disease; others have construed it to mean the day on which an underlying claimant knew or should have known of the presence of his or her injuries (or disease);[10] and it has even been suggested that manifestation is the date on which the policyholder became aware that it might be sued in the future. Some advocates have construed "exposure" to mean the point or points in time when the causative acts (i.e., inhalation or ingestion of the toxic substance) occurred. Other advocates construed exposure to include not only the time of inhalation or ingestion, but also the period of continuing injury after inhalation or ingestion ceases.[11]

The "manifestation" theory would operate to trigger only the policy in force when injury is discovered, usually a current year for which, in most instances, no insurance coverage is available. Under the "exposure" theory, only the insurance policies in force during the early years of a progressive injury would be triggered. Such policies usually have low limits or otherwise provide only limited coverage. "Manifestation" and "exposure" thus ignore most of the years when the injury is progressing "in residence" in the body of the claimant in the underlying injury suit.[12]

Neither the manifestation theory nor the exposure theory is consistent with the policy language. The CGL policy language, the intent of the policy draftsmen and prior cases amply support the conclusion reached by the Court of Appeals in the District of Columbia in Keene, that the injury process triggers coverage under the standard CGL policies continuously from first inhalation or ingestion, through exposure "in residence" and through manifestation of injury.[13]

The Eagle-Picher Decision

Eagle-Picher involved an insurance coverage dispute arising out of the policyholder's liability for asbestos damage claims. Eagle-Picher was uninsured prior to 1968 and had entered into a separate written agreement with its primary insurance company which provided that asbestos damage claims would be handled by the primary insurer on a manifestation basis.

In the district court, Eagle-Picher (the policyholder) and some of its insurance companies had urged a "manifestation" trigger of coverage of its standard CGL insurance policies,[14] a position consistent with the separate written agreement. Other insurance companies advocated an "exposure" trigger of coverage, thus raising the spectre that Eagle-Picher's primary coverage, pursuant to the written agreement requiring manifestation, would be construed differently from its excess coverage.

The district court adopted Eagle-Picher's position and held that manifestation, not exposure, triggered coverage. The court stated:

> In the present case, the Court is ... faced with one construction which would provide coverage, and another which leaves Eagle-Picher uninsured. Here ..., it is the manifestation theory which is like[ly] to maximize the coverage provided to Eagle-Picher in the underlying lawsuits.[15]

Between the time of the district court's decision and the appeal to the First Circuit, the District of Columbia Circuit decided Keene Corp. v. Insurance Co. of North America,[16] in which it ruled that the standard CGL policies are triggered by injury, including the injury which occurs with inhalation exposure, the injury which progresses "in residence" in the body of a claimant after the initial inhalation exposure, and through manifestation. On appeal, Eagle-Picher abandoned its manifestation argument and sought, for the first time, to apply the Keene decision.

The First Circuit rejected Eagle-Picher's new argument for several reasons. In Keene, the court found that the language of the standard CGL insurance policies was ambiguous. The court thus focused on the policyholder's objective reasonable expectations of coverage, and construed all ambiguities in favor of the insured to promote coverage. In *Eagle-Picher*, however, the parties had stipulated that the policy language was unambiguous and the court was constrained to construe the terms with reference to their plain and ordinary meanings (*i.e.*, dictionary definitions) and to omit extrinsic evidence of the parties' intent as to the policies' meaning.[17] The court specifically noted that if the parties had raised the issue of ambiguity, Eagle-Picher would have had a "different and more compelling case."[18]

In view of the conflicting interpretations of the standard CGL policy language advanced by various insurance companies, it is not surprising that each federal appellate court that has considered these policies in the context of cumulative trauma cases has found the policies to be ambiguous.[19] In fact, although the court in *Eagle-Picher* was constrained to accept the parties' agreement that the policies were unambiguous, the First Circuit implicitly recognized the ambiguity of the policy language by constrasting "the parties' position that the policy language was plain and clear" with the fact that "the [same] parties were dramatically opposed in their reading of what was plainly and clearly stated."[20]

The *Eagle-Picher* court distinguished *Keene* for another, though less compelling, reason.

> [G]iven Eagle-Picher's stance in the district court, the rationale and holding of *Keene* are

> unavailing for another reason. In Keene, the court construed the policies in order to fulfill the "reasonable expectations of [the insured] when it purchased the policies." Whatever the expectations of the insured in that case, it is clear that Eagle-Picher had no similar expectations here, or it would certainly have argued such a theory in the court below.[21]

Although the First Circuit makes a good debater's point, its application of the "reasonable expectations" rule is legally unsound. The law is clear that the objective reasonable expectations of the policyholder are to be fulfilled.[22] The Keene court followed this rule.[23] In contrast, the Eagle-Picher court erroneously allowed the subjective expectations of the policyholder (as the court perceived them) to control.

Finally, the First Circuit affirmed the manifestation trigger of coverage in order to protect the policyholder and afford it the maximum coverage possible, given the policyholder's prior written agreement with its primary insurance company.[24]

> Here, Eagle-Picher was uninsured prior to 1968, the period in which most of the injury-producing exposure took place. . . . Coverage based on manifestation was certainly more desirable than coverage based on exposure, given that Eagle-Picher was uninsured during the longest period of exposure and that the number of claims was accelerating during the period of coverage. That Eagle-Picher and [its primary insurance company] agreed to interpret their policies on a manifestation basis in April, 1972, also shows that Eagle-Picher intended such an approach once the issue of manifestation versus exposure had been considered. We therefore agree with the district court that, in this case, the public policy underpinnings of insurance law support the manifestation result.[25]

Thus, it is clear that First Circuit limited its decision in Eagle-Picher to the unique facts of that case.[26]

The Keene Decision

In the Keene case, which was a dispute over insurance coverage for a policyholder's liability for asbestos injury claims, the Court of Appeals for the District of Columbia Circuit found complete insurance coverage for the policyholder's legal liability for asbestos damage claim lawsuits and rejected the opposing and inconsistent contentions of the insurance companies that would have operated to limit their coverage obligations.

The Keene decision thus remains an important precedent for insurance coverage in cases involving long-term injuries allegedly caused by drugs such as diethylstilbestrol (DES); medical devices such as intra-uterine devices (IUD); inhaled substances such as asbestos, cotton dust and silica; and chemicals such as beryllium, benzene, formaldehyde, polybrominated biphenyl, dimethyl-tindichloride and Agent Orange. The decision also may be applicable to workers' compensation insurance coverage.

In Keene, the Court of Appeals for the District of Columbia Circuit held that (1) injury is the trigger of insurance coverage, including the injury that occurs with inhalation exposure, injury that occurs with exposure "in residence" after inhalation ceases and injury that occurs at manifestation; (2) once an insurance policy is triggered by injury, the triggered insurance policy covers all sums which the policyholder is legally obligated to pay to the injured claimant; (3) the policyholder is not required to pay any portion of the damages or defense costs for any period during which it was uninsured or for which it is unable to prove coverage; and (4) the "other insurance" provisions in the policies permit the insurance companies to seek contribution from each other, but not from the policyholder, where successive policies were in force during the period of progressive injury.[27]

The heart of the Keene opinion with respect to the scope of coverage is contained in the following two paragraphs:

> As stated above, each policy has a built-in trigger of coverage. Once triggered, each policy covers Keene's liability. There is nothing in the policies that provides for a reduction of the insurer's liability if an injury occurs only in part during a policy period. As we interpret the policies, they cover Keene's entire liability once they are triggered. That interpretation is based on the terms of the policies themselves. We have no authority upon which to pretend that Keene also has a "self-insurance" policy that is triggered for periods in which no other policy was purchased. Even if we had the authority, what would we pretend that the policy provides? What would its limits be? There are no self-insurance policies, and we respectfully submit that the contracts before us do not support judicial creation of such additional insurance policies.
>
> Hartford argues that this allocation of liability allows Keene to "enjoy the benefits of insurance coverage which it has never paid for." Hartford's brief at 31. The contrary point, however, is more accurate: For an insurer to be only

> partially liable for an injury that occurred, in part, during its policy period would deprive Keene of insurance coverage for which it paid. With each policy, Keene paid for insurance against all liability for bodily injury. The policies do not distinguish between injury that is caused by occurrences that continue to transpire over a long period of time and more common types of injury. Nor do the policies provide that "injury" must occur entirely during the policy period for full indemnity to be provided.[28]

Although successive policies are applicable to individual claims, the court seemingly held that only one policy's limits can apply to each claim of injury.[29] The court did not address the situation in which a single continuing injury claim exceeds the annual policy limits during each year of coverage. Although the court held that it would not "stack" annual coverage limits as to any one claim,[30] this aspect of the court's holding is unclear and probably is irrelevant to most cases because each claim usually costs the policyholder a sum well within any of its individual insurance policy limits. According to some insurance companies, however, stacking of successive policy limits is consistent both with the standard CGL insurance policies and insurance industry practices.[31]

To avoid administrative complications, the court stated that the policyholder may select the policy under which it is to be indemnified and defended.[32] With regard to defense costs, the court stated: "Because we hold that each insurer is fully liable to Keene for indemnification, it follows that each is fully liable for defense costs."[33]

Thus, under the Keene decision, each insurance company whose policy is triggered is fully liable for the policyholder's legal liability and defense costs, except that each such insurance company may seek contribution from the other insurance companies whose policies also have been triggered.

The Scope of Coverage

As noted above, once an insurance policy is triggered, the policy language requires the insurance company to pay on behalf of the policyholder "all sums" which the policyholder becomes legally obligated to pay as damages because of bodily injury.

Certain insurance companies have contended that their obligation is to pay only a pro-rata share of the policyholder's damages and costs based on the supposition that only a portion of the injury may have occurred during their policy periods. The pro-rata position advanced by these insurance companies operates to allocate to the policyholder a portion of the legal liability and defense costs for periods during which the policyholder was uninsured or for which the policyholder is unable to prove the existence of its insurance coverage.

Most policyholders dispute the pro-rata approach and urge that "all sums" means all sums. They also have shown that it is not possible to assign portions of an indivisible injury to particular policy periods. The "Other Insurance" clauses of the CGL policies provide for an allocation of the loss, but only among insurance companies. These clauses, examples of which are quoted in *Keene*, generally provide for "contribution by equal shares" or "contribution by limits"[34] among insurance companies.

The District of Columbia Circuit directly confronted the issue of proration of indemnity costs and defense costs in *Keene* and found, as a matter of law, that the standard policy language does not provide for proration to the policyholders.[35] Similarly, in *Eagle-Picher*, the First Circuit rejected the pro-rata argument advanced by some of the insurance companies.[36]

1. *AC and S, Inc. v. Aetna Casualty & Surety Co.*, 666 F.2d 819 (3d Cir. 1981);

Insurance Co. of North America v. Forty-Eight Insulations, Inc., 451 F. Supp. 1230 (E.D. Mich. 1978), *aff'd*, 633 F.2d 1212 (6th Cir. 1980), *aff'd on reh'g*, 657 F.2d 814 (6th Cir.), *cert. denied*, 102 S. Ct. 686 (1981);

Keene Corp. v. Insurance Co. of North America, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 102 S.Ct. 1644-45 (1982).

Porter v. American Optical Corp., 641 F.2d 1128 (5th Cir.), *cert. denied*, 102 S. Ct. 686 (1981);

Michigan Chemical Corp. v. Travelers Indemnity Co., 530 F. Supp. 147 (W.D. Mich. 1982);

Commercial Union Insurance Co. v. Pittsburgh Corning Corp., No. 81-2129 (E.D. Pa. Dec. 4, 1981);

Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co., 523 F. Supp. 110 (D. Mass. 1981), *aff'd as modified*, 682 F.2d 12 (1st Cir. 1981), *reh'd denied*, Nos. 81-1761/62/63 (1st Cir. Aug. 30, 1982);

Transamerica Insurance Co. v. Bellafonte Insurance Co., 490 F. Supp. 935 (E.D. Pa. 1980);

Emons Industries, Inc. v. Liberty Mutual Fire Insurance Co., 481 F. Supp. 1022 (S.D.N.Y. 1979);

Tenneco Chemicals, Inc. v. Continental Casualty Co., No. 78 Civ. 2188 (S.D.N.Y. May 16, 1979);

National Guarantee Insurance Co. v. East Coast Insurance Co., No. C-76-2630 (N.D. Cal. Nov. 15, 1978);

Tenneco Chemicals, Inc. v. Employers Mutual Liability Insurance Co., [1977] Fire & Casualty Cases (CCH) 77-940 (S.D.N.Y. 1977);

Tenneco Chemicals, Inc. v. Employers Mutual Liability Insurance Co., [1968] Fire & Casualty Cases (CCH) 68-984 (S.D.N.Y. 1968);

Zurich Insurance Co. v. Raybestos, No. 78 L 8760 (Ill. Cir. Ct. Cook County, May 18, 1982);

Kremers-Urban Co. v. American Employers Insurance Co., No. 545-086 (Cir. Ct. Milwaukee County, Dec. 15, 1981), *reprinted* *in* Asbestos Litigation Reporter (Andrews Publications, Inc.) at 4,430 (Jan. 22, 1982);

Schultheis v. Centennial Insurance Co., 108 Misc.2d 725, 438 N.Y.S.2d 687 (Sup. Ct. 1981); and

American Motorists Insurance Co. v. E.R. Squibb & Sons Inc., 95 Misc.2d 222, 406 N.Y.S.2d 658 (Sup. Ct. 1978).

2. Jerold Oshinsky, *Comprehensive General Liability Insurance: Trigger and Scope of Coverage in Long-Term Exposure Cases*, 17 The Forum (American Bar Ass'n, Spring 1982).

3. *Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co.*, 523 F. Supp. 110 (D. Mass. 1981), *aff'd as modified*, 682 F.2d 12 (1st Cir. 1982), *reh'g denied*, Nos. 81-1761/62/63 (1st Cir. August 30, 1982).

4. *Keene Corp. v. Insurance Co. of North America*, *supra*, n. 1; *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, *supra*, n.1; *Porter v. American Optical Corp.*, *supra*, n. 1.

5. The standard CGL policies were adopted by the insurance industry in 1966 and have been in widespread use in the United States. Insurance against legal liability has been a part of the American insurance scene for generations. Annot., 37 A.L.R. 644 (1925). *See generally* Comment, *Liability Insurance for Insidious Disease: Who Picks Up the Tab?* 48 Fordham L. Rev. 657 (1980); Senne, *Insurance Law -- Products Liability Insurance -- Time of Exposure Triggers Coverage for Asbestos-Related Disease*, 26 Wayne L. Rev. 1127 (1980).

6. The standard CGL insurance policy language was drafted under the auspices of various insurance industry associations, including the National Bureau of Casualty Underwriters, the Mutual Insurance Rating Bureau and, since 1972, the Insurance Services Office.

7. The policy language is quoted from *Keene Corp. v. Insurance Co. of North America*, *infra*, n.16, 667 F.2d at 1039.

8. Nachman, *The New Policy Provisions for General Liability Insurance*, 18 The CPCU Annals 197 (Fall 1965). *See also* Wendorff, *The New Standard Comprehensive General Liability Insurance Policy*, ABA Section of Insurance, Negligence and Compensation Law Proceedings 250, 254 (1966). Mr. Wendorff was a member of the Joint Forms Committee of the

National and Mutual Bureaus that drafted the standard CGL policy language.

9. The first appellate court decision to address the insurance coverage issues with respect to asbestos claims was Insurance Co. of North America v. Forty-Eight Insulations, Inc., supra, n. 1. The court in Forty-Eight was presented with the two insurance industry positions of "exposure" versus "manifestation" and held that, as between the two choices presented, exposure was the appropriate trigger of coverage since that construction would maximize the policyholder's coverage. The court also held that the policyholder was liable for a pro rata share of damages and defense costs for uninsured or self-insured years.

In Porter v. American Optical Corp., supra, n. 1, which involved a defective respirator, the court followed the Forty-Eight decision. The court rejected manifestation and applied the exposure trigger of coverage without an independent analysis of the issues. Proration to the policyholder was not an issue in Porter.

The district court for the Eastern District of Pennsylvania recently rendered a decision regarding the trigger of coverage issue in Commercial Union Insurance Co. v. Pittsburgh Corning Corp., supra, n. 1. The controversy in Pittsburgh Corning was phrased in terms of whether the insurance policies covered "asbestos injuries (1) resulting from exposure to asbestos during the policy period, as opposed to (2) manifesting themselves during the policy period." (Memorandum op. at 2.)

In its analysis, the court noted a difference between the policy language in Pittsburgh Corning and Keene. The court stated: "Thus, in contrast to the policy in Keene, . . . the policy here is unclear on whether the 'occurrence' or the 'injury' must occur during the policy period. This ambiguity also must be construed in the insured's favor." Memorandum op. at 24 n. 23. Pittsburgh Corning's policies were said to be triggered by "happenings arising out of or resulting from one event taking place during the terms of this policy." Id. at 24. The court rejected manifestation and construed the ambiguous insurance policy in favor of the policyholder, which had urged an exposure approach. The court held that the insurance company "must indemnify for asbestos injury caused by exposure during the policy period." Id. at 25.

10. The district court in Eagle-Picher, supra, n. 3, adopted the date of medical diagnosis as the date of injury, as urged by the insurance company "manifestation theorists."

On appeal, the First Circuit rejected this date and ruled that manifestation occurs when a disease "becomes reasonably capable of medical diagnosis," as the policyholder had argued. 682 F.2d at 25.

11. The policyholder in *Keene*, *infra*, n. 16, argued that the period of continuing *injury is one* of the triggers of coverage under the standard CGL policies. The District of Columbia Circuit agreed. 667 F.2d at 1045, 1047.

12. In *Keene*, the district court found that 15 to 20 years or more can pass following an inhalation of asbestos before disease manifests itself. 667 F.2d at 1040 n. 9. As to claimants who ultimately manifest asbestos-related disease, the injury progresses in the body of the claimant during this period. However, the D.C. Circuit court broadly stated that:

> If a disease could be predicted to develop many years after inhalation of asbestos, yet no cellular changes were known to occur during that period, we would still hold that all policies are triggered from the point of exposure through the point of manifestation.

667 F.2d at 1044 n. 19.

13. There are some "occurrence" policies which provide that the causative act or occurrence triggers coverage. Such policies occasionally have been contrasted with standard CGL policies. *See Insurance Co. of North America v. Sam Harris Construction Co., Inc.*, 22 Cal.3d 409, 149 Cal. Rptr. 292, 583 P.2d 1335 (1978). Some courts have held that the CGL policy is triggered both by (i) injury during the policy period and (ii) the occurrence of the causative event. *See Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co.*, *supra*, n.3; *Kremers-Urban Co. v. American Employers Insurance Co.*, *supra*, n. 1. In *AC and S, Inc. v. Aetna Casualty & Surety Co.*, *supra*, n. 1, although the issue was not before it, the court observed that the CGL policies were triggered by an "occurrence" or "accident" during the policy period. The court in *National Guarantee Insurance Co. v. East Coast Insurance Co.*, *supra*, n. 1, which involved defective intra-uterine devices, began its analysis of whether the policies were triggered by exposure (insertion of the IUD) or by manifestation by examining the definition of "occurrence" in the policies. The court then followed the decision of the trial court in *Forty-Eight*, *supra*, n. 1, and held that the policies were triggered by "exposure" and not by "manifestation." Thus, the decision did not turn on the definition of

"occurrence" nor on the use of that word in the policy. See n. 14, infra.

14. One of the insurance policies in issue in Eagle-Picher was an "occurrence," not a standard CGL, policy. However, the First Circuit construed both types of policies identically, in order to fulfill the reasonable coverage expectations of the policyholder. 682 F.2d at 23-24. See n. 13, supra.

15. 523 F. Supp. at 118.

16. Keene Corp. v. Insurance Co. of North America, 667 F.2d 1034 (D.C. Cir. 1981), cert. denied, 102 S.Ct. 1644-45 (1982).

17. The Eagle-Picher court did examine medical evidence regarding asbestos injury. The difference between its medical conclusions and those in Keene are largely due to the fact that, in Eagle-Picher, such testimony was filtered through the "plain and ordinary meaning" rule. Thus, for example, the court tended to prefer "the ordinary meaning of the word ['asbestosis'] to a treating physician or patient" over "the specialized meaning of 'asbestosis' to a research scientist." 682 F.2d at 18 (emphasis supplied). The 'treating physician" and, especially, "patient" tests are seriously flawed in their over-dependence upon uncontrollable and unpredictable variables. See n. 26, infra.

18. Id. at 21.

19. Keene, Forty-Eight and Porter, supra, n. 1.

20. 682 F.2d at 18.

21. Id. at 23 (citations omitted) (emphasis supplied).

22. Keeton, Insurance Law Rights at Variance with Policy Provisions, 83 Harv. L. Rev. 961, 967 (1970).

23. Keene, supra, n. 16, 667 F.2d at 1041.

24. The Eagle-Picher court referred to health insurance and statute of limitations cases in support of the manifestation trigger of coverage. The Keene court recognized that those cases do not properly apply to asbestos injury coverage disputes, but that such cases merely support the policy of providing coverage to the policyholder. 667 F.2d at 1043 n. 17.

25. 682 F.2d at 23 (emphasis supplied).

26. As previously noted, *supra*, n. 10, the First Circuit modified the District Court's decision as to when manifestation takes place, and ruled that manifestation occurs when an asbestos-related disease becomes reasonably capable of diagnosis. 682 F.2d at 25. Aside from the fact that the language of the standard comprehensive general liability insurance policies simply does not support solely a manifestation trigger of coverage, the "diagnosis test" is flawed for the further reason that it is subject to numerous fluctuating and unpredictable local variables (*e.g.*, the skill of the particular diagnostician, the availability, accuracy and technological advancement of diagnostic equipment and facilities in a given community and the state of the diagnostic art in a particular community). *See* n. 17, *supra*. In contrast, the *Keene* decision looks at asbestos injury from a more scientific perspective and therefore would result in more certain and consistent findings.

27. Direct support for the *Keene* decision is found in the three *Tenneco* cases cited in n. 1 and in *Harman v. American Casualty Co. of Reading, Pennsylvania*, 155 F. Supp. 612 (S.D. Cal. 1957); *Gruol Construction Co. v. Insurance Co. of North America*, 11 Wash. App. 632, 524 P.2d 427 (Ct. App. 1974); *Snapp v. State Farm Fire and Casualty Co.*, 206 Cal.App.2d 827, 24 Cal. Rptr. 44 (Cal.App. 1962); and *American Mutual Liability Insurance Co. v. Agricola Furnace Co.*, 236 Ala. 535, 183 So. 677 (Ala. 1938). *See also Schultheis v. Centennial Ins. Co.*, *supra*, n. 1; *American Motorists Insurance Co. v. E.R. Squibb & Sons Inc.*, *supra*, n. 1.

28. 667 F.2d at 1048-49 (footnotes omitted).

29. *Id.* at 1049.

30. *Id.*

31. For example, in the *Forty-Eight* case, *supra*, n. 1, Travelers acknowledged that "the available limit for each policy year of coverage can be stacked." Brief to the Court of Appeals for The Travelers at 31.

32. 667 F.2d at 1049-50, 1051.

33. *Id.* at 1050.

34. 667 F.2d at 1050 n. 35.

35. 667 F.2d at 1047.

36. 682 F.2d at 19. The court in Forty-Eight, supra, n. 1, prorated a portion of the defense and indemnity costs to the policyholder. See note 9, supra. The decision in Emons Industries, Inc. v. Liberty Mutual Fire Insurance Co., supra, n. 1, was limited to defense costs. Liberty had provided coverage for six years and Reserve had provided coverage for only one year. The court held that "the disparate number of years of coverage notwithstanding, both insurance companies stand on equal footing with respect to potential liability and their concomitant duty to defend." 481 F. Supp. at 1026. Each insurance company thus was responsible for one-half of the defense costs.

November 15, 1982

STATUS REPORT ON STAYS AND SEVERANCES (BY JURISDICTION)

STAY ACKNOWLEDGED OR GRANTED AS TO ALL PARTIES

JOHNS-MANVILLE

ALABAMA

On September 9, Judge Mullins of the Jefferson County Circuit Court stayed all actions in that court. The order implicitly recognizes an automatic stay as to all parties.

The Alabama Supreme Court granted an uncontested motion for stay in cases from Birmingham which are on appeal. The court denied a contested motion to stay cases on appeal from the Mobile County Circuit Court.

ARKANSAS

Orval L. Reed v. Armstrong Cork Co., LR-C-79-477 (E.D. Ark. Sept. 8, 1982). In a hearing held on October 5, the court removed the case from the November 1 trial docket. The next trial date is now April. The district court is awaiting developments in Hawaii, one of the few states with a virtually identical joint tortfeasors' statute.

CALIFORNIA

St. Jacque v. Johns-Manville Products Corp., No. C 137 465 (Cal. Super. Ct. Los Angeles County, Aug. 27, 1982) (Markey, J.) (reversing its own earlier order respecting the Unarco filing).

In California Superior Court in San Diego, Judge Lewis has ordered a stay until January 14, 1983, or earlier if either the Illinois or New York Bankruptcy Court reaches some provision for the handling of the asbestos cases.

In Ellison v. Johns-Manville Corp., CV 82-3567 AAH (BX) (C.D. Cal. Oct. 18, 1982), Judge Houk has stayed the asbestos cases until the Bankruptcy Court in the Southern District of New York has resolved the Manville bankruptcy application.

Judge Fannin of the Superior Court, County of Contra Costa, has ruled that the bankruptcy stay applies to all cases in his jurisdiction.

DELAWARE

Nutt v. AC&S, C.A. No. 80C-FE-8 (Del. Super. Ct. Sept. 9, 1982) (all state court proceedings stayed for 60 days, except proceedings directed solely to defendants' motions to dismiss for lack of personal jurisdiction, and motions regarding employers' defenses under the workmen's compensation exclusive remedy). On November 10, the court continued the stay pending its decision on plaintiff's motion to sever, which is expected in two-three weeks.

In O'Neal v. Huxley Development Corp., C.A. No. 82-79 (D. Del. Sept. 13, 1982), Judge Schwartz entered an identical stay order to expire the same day as the state court order, as a matter of comity. As with the state court judge, Judge Schwartz has continued the stay pending his decision on plaintiff's motion.

DISTRICT OF COLUMBIA	Thomas v. Johns-Manville, No. 82-0793 (D.D.C. Aug. 31, 1982) (Johnson, J.) (stayed for approximately 5 months); Brandenburg v. Johns-Manville Sales Corp., Civ. No. 81-1832 (D.D.C. Sept. 14, 1982) (indefinite stay); Royall v. Johns-Manville Sales Corp., Civ. No. 82-1209 (D.D.C. Sept. 16, 1982) (indefinite stay). Fulwood v. Johns-Manville Sales Corp., C.A. 13860-80 (D.C. Super. Ct. Oct. 4, 1982) (Doyle, J.) (stay until January 1983).
FLORIDA	Barnett v. National Gypsum Co., No. 82-6280-Civ-JCP (S.D. Fla. Oct. 5, 1982) (Paine, J.) (cases stayed until further order "after the stay order in the Johns-Manville bankruptcy proceeding has been lifted or modified to the extent that it no longer prevents further proceedings herein"). The Circuit Court for Dade County, Florida (Vann, J.) has entered a "moratorium," or informal stay, of cases in that court until November 18. Leddy v. Johns-Manville Sales Corp., No. 79-10848-CA (Fla. Cir. Ct., Duval County Oct. 25, 1982) (Pate, J.). Case stayed until January 13, 1982. Judge Carr in Tampa has stayed all cases until January 17, 1983. In Orlando, Judge Breed found that the cases are stayed as to JM, and Unarco without a request for any determination by any party; clarification of the scope of his order has been requested.
GEORGIA	In Georgia, plaintiffs and defendants voluntarily agreed to a 60-day

stay, which was granted by Judge Vining. *Wilkerson* v. *Johns-Manville Sales Corp.*, Civ. No. C79-2036A (N.D. Ga. Sept. 2, 1982); *Hurtt* v. *Johns-Manville Sales Corp.*, Civ. No. C-82-96 N (N.D. Ga. Sept. 2, 1982); *Stapleton* v. *Celotex Corp.*, Civ. No. CV280-128 (S.D. Ga. Sept. 2, 1982); *Watson* v. *Celotex Corp.*, Civ. No. CV 179-240 (S.D. Ga. Sept. 2, 1982); *Hendrix* v. *Johns-Manville Sales Corp.*, Civ. No. CV 479-326 (S.D. Ga. Sept. 2, 1982). At the end of the 60-day period, Judge Vining lifted the stay, but is permitting the filing of briefs on the question of reinstituting the stay.

Another federal court also acknowledged a stay as to all parties. *McBride* v. *Johns-Manville Sales Corp.*, Civ. No. 82-257-2-Mac (M.D. Ga. Sept. 3, 1982). The state court cases were stayed. *Bates* v. *Celotex Corp.*, Civ. No. 82-1714 (County Ct. Chatham County Sept. 1, 1982).

HAWAII

In Hawaii Circuit Court, Judge Chang has stayed all cases before him on the grounds that the cases cannot proceed without Johns-Manville.

ILLINOIS

In the Circuit Court of Cook County, Judge Gordon has informally suggested that there is an automatic stay as to all parties in all cases, pending resolution of the bankruptcy proceedings.

Mau v. *Unarco Industries, Inc.*, No. 482 0157 (Ill. App. Ct. 4th District Sept. 16, 1982) (appeal stayed "pending consideration of the entire matter in the United States Bankruptcy Court")

INDIANA

In the Southern District of Indiana, Judge Dillon has ordered a stay of all proceedings pending before him.

In the Northern District of Indiana, Judge Moody has ordered a stay of all proceedings pending before him until January 31, 1983.

LOUISIANA

Wedgeworth v. Fibreboard Corp., Civ. No. 80-203-B (M.D. La. Sept. 28, 1982) (indefinite stay, pending Fifth Circuit ruling on issue of automatic stay and the debtors' indispensability).

In the Eastern District of Louisiana, two judges have granted a stay: Manguno v. Turner-Newall Ltd., Civ. No. 82-1570 (Schwartz, J.) (stay pending 5th Circuit action); Miceli v. American Petrofina, Civ. No. 82-2621 (Mentz, J.). One judge has denied a stay (see page 12).

MAINE

In Beaulieu v. Amatex Corp., CV 80-612 (Me. Super. Ct. Sept. 10, 1982), the one case pending in Maine state court has been stayed for 90 days by Judge Bradford, and plaintiffs' motion to sever J-M and Unarco was denied.

Judge Gignoux of the United States District Court in Maine has issued a temporary stay of all asbestos-related actions in which Unarco Industries, Inc. and Manville Corporation are parties. After January 1, 1983 counsel are to report on the current status of bankrutpcy court proceedings.

MARYLAND

The Maryland Court of Appeals has stayed all appellate proceedings in Pierce v. Johns-Manville Sales Corp. and Weinberg v. Johns-Manville Sales Corp. for 60 days, which had been scheduled for argument in October.

Binnix v. Johns-Manville Sales Corp., HM 80-1176 (D. Md. Oct. 1, 1982) (Murray, J.) (suspending all proceedings until December 1, 1982)

All of the asbestos cases in Baltimore County Circuit Court are "unofficially" stayed. All pending court hearings and discovery matters are postponed indefinitely.

MICHIGAN

All federal cases before Judge Thornton in the Eastern District of Michigan have been "held in abeyance" as of September 3, 1982 pending further notice.

MINNESOTA

In the United States District Court in Minnesota, on September 8, Judge MacLaughlin, citing § 362, held all actions in abeyance pending the lifting of the stay by the Bankruptcy Court, or a determination by the court that the stay is applicable only as to J-M. In In re Asbestos Cases (Minn. Dist. Ct. Hennepin County, Oct. 15, 1982), Judge Bowen has also stayed all cases until further order.

MISSISSIPPI

Wedgeworth v. Armstrong Cork, Civ. No. J78-0002(N) (S.D. Miss. Aug. 30, 1982) (Magistrate Roper) (staying all cases in Southern District of Mississippi). At a hearing before Magistrate Roper and Judge Nixon on November 5 concerning all asbestos cases pending in the Southern District, Judge Nixon said he will do nothing for at least thirty days, intending to wait until the Bankruptcy Court acts. The only exception is he will permit the taking of depositions of 4 critically ill plaintiffs.

In *Wilson* v. *Owens-Corning Fiberglas Corp.*, Civ. No. WC 81-41-LS-P (N.D. Miss. Sept. 13, 1982), Judge Senter, while "acknowledging" the stay only as to J-M and Unarco, stayed all discovery pending a hearing.

MISSOURI

Judge Wangelin, Chief Judge of the United States District Court for the Eastern District of Missouri, has issued an order staying all cases pending the final disposition of Manville's case in the United States Bankruptcy Court for the Southern District of New York.

NEW HAMPSHIRE

In New Hampshire, all cases have been stayed by Judge Pappagianis (state court), except for one case where only Amatex is a defendant.

OHIO

Clutter v. *Johns-Manville Sales Corp.*, No. C 78-229 (N.D. Ohio, Sept. 8, 1982) (stay granted on grounds J-M was indispensable party).

PENNSYLVANIA

In the Eastern District of Pennsylvania, Judge Weiner has extended a stay of the cases pending in federal court until November 3. He has issued no new order since that date, and the stay remains at least informally in effect.

The Superior Court of Pennsylvania has stayed all proceedings as to all parties who are before the Court on any asbestos case on appeal.

TENNESSEE

In the Eastern District of Tennessee, Judge Frank Wilson ordered that the trials in Broome v. Accurate Felt & Gasket Manufacturing, CIV-1-81-432 (E.D. Tenn.), Sutherland v. Accurate Felt & Gasket Manufacturing Co. CIV-1-81-147, and Wood v. Accurate Felt & Gasket Manufacturing Co., CIV-1-81-476, be continued with a status conference being set for 4:00 p.m., Friday, December 3, 1982.

Judge Robert Taylor of the Eastern District has postponed trials for 60 days; he has not, however, stayed discovery.

TEXAS

Judge Parker has stayed all cases pending in Beaumont through 12/31/82 (but has severed J-M and Unarco in approximately 20 consolidated cases set for trial on October 25 in Marshall).

In federal district court in Corpus Christi, Texas, Judge Hayden Head has stayed cases for 120 days.

In Alford v. Johns-Manville Sales Corp., Civ. No. V-81-6 (S.D. Tex. Sept. 29, 1982), the cases in the Victoria Division of the Southern District have been stayed for 60 days.

In Marshall, 13 cases set for trial have been indefinitely postponed. In addition, the Morris Hayes case, set for trial on November 8 before Judge Steger, will not go to trial until the JM bankruptcy case has been resolved.

WASHINGTON

In Washington, in King County (Seattle), an indefinite stay of approximately 300 cases has been entered; in Kitsap County, 100 cases have been stayed for 6 months; in Benton County, there is a stay of all proceedings until January 28, 1983 (Mitchell v. Johns-Manville Corp., No. 79-2-00791-6 (Benton Cty Super. Ct.)).

UNARCO

- Austin v. Unarco Industries, Inc., 82-1168 (1st Cir. Aug. 5, 1982)
- Clutter v. Johns-Manville Sales Corp., No. C 78-229 (N.D. Ohio, Aug. 2, 1982)
- Stayanoff v. Unarco Industries, Inc., Civ. No. F-80-96 (N.D. Ind., Aug. 24, 1982)
- Steele v. Amchem Products, No. N-28037 (Tenn. Cir. Ct. Hamilton County, Aug. , 1982) (Summitt, J.)

STAY DENIED OR GRANTED ONLY AS TO DEBTOR, OR SEVERANCE OF DEBTOR ORDERED

JOHNS-MANVILLE

CALIFORNIA

In re: Asbestos Cases, No. C-79-3588 RFP (N.D. Cal. Sept. 14, 1982) (Peckham, J.) (all claims, counterclaims, cross-claims and third-party claims brought by or against J-M or Unarco are severed and stayed, with all remaining claims involving other parties to proceed unabated). Defendants have requested certification for interlocutory appeal.

In San Mateo Superior Court, Judge Bible has severed J-M and Unarco out of one of the three cases (*Cauley*) in which a motion was brought. He did not sever them from the other two cases (*Chittka* and *Steinkamp*), but stated he would consider the motions on a case-by-case basis.

In Napa County Superior Court, Judge Champlin has denied a stay.

In Solano County Superior Court Judge Ely has denied a stay.

In Sacramento County Superior Court Judge White has denied a stay.

In San Francisco Superior Court Judge Pollack has granted a stay only as to J-M and UNARCO and has severed both from the cases pending in this jurisdiction.

In Alameda County Superior Court Judge McCullum has granted a stay only as to J-M and UNARCO and has severed both from the cases pending in this jurisdiction.

COLORADO	John Wolfe, et al. v. Johns-Manville, et al., Colorado District Court, Boulder County. Judge Enwall has denied a request of defendants for a stay. No formal order was issued.
DISTRICT OF COLUMBIA	On plaintiff's motion for reconsideration, in Nichols v. Johns-Manville Sales Corp., Civ. No. 81-2514 (D.D.C.), the court has severed J-M and Unarco. Defense counsel are in turn moving for reconsideration of the court's decision.
FLORIDA	Judge Reed has ruled that the cases are stayed as to Johns-Manville only. Barber v. Armstrong Cork Co., No. 80-417-Orl-Civ-R (M.D. Fla. Sept. 13, 1982), Newcomb v. Johns-Manville Sales Corp., No. 82-224-Orl-Civ-R (M.D. Fla. Sept. 13, 1982), and Cubbedge v. Johns-Manville Sales Corp., No. 81-395-Orl-Civ-R (M.D. Fla. Sept. 13, 1982). Judge Black of the federal court in Jacksonville has ruled that the cases could go forward as to defendants other than J-M in the Sikura case.
GEORGIA	Hendrix v. Raymark Industries, CV479-326 (S.D. Ga. Sept. 15, 1982) (motion for stay of appeal refused).
ILLINOIS	Judge Dearborn, has stayed Costello v. Unarco Industries, Inc., No. 81-L-191 (Ill. Cir. Ct. Oct. 14, 1982) as to Johns-Manville and Unarco only.

On October 26, 1982, Judge Bumgarner in the *Graves* case granted plaintiff's motion to sever J-M and Unarco.

KANSAS

Miller v. *Johns-Manville Sales Corp.*, No. 81-1003 (D. Kansas Oct. 15, 1982) (motion for stay denied).

LOUISIANA

Fontenot v. *Fibreboard Corp.*, Civ. No. 79-0738 (W.D. La. Sept. 14, 1982) (Hunter, J.) (motion for stay denied, and debtors severed. Judge Hunter certified the issue for interlocutory appeal, and appeal has been taken to the Fifth Circuit). The Fifth Circuit has established a briefing schedule.

In the Eastern District of Louisiana, one judge has denied a stay: *Ogea* v. *Eagle-Picher Industries, Inc.*, Civ. No. 81-4684 (Sear, J.). Two judges have granted a stay (see page 5).

MARYLAND

Judge Harvey of the federal court in Maryland has denied a stay and has severed J-M and UNARCO in all cases assigned to him. Notice for leave to file interlocutory appeal has been filed. Certification of the "stay issue" was refused.

Judge Young of the federal court in Maryland has denied a stay and has severed J-M and UNARCO in all cases assigned to him. Judge Young also refused to make any certification of the "stay issue."

Judge Miller of the federal court in Maryland has denied a stay and has severed J-M and UNARCO in all cases assigned to him.

	Aumiller v. *Johns-Manville Corp.*, Civ. No. Y-81-585 (D. Md. Oct. 19, 1982) (motion to sever granted) (certification of the stay issue refused).
MASSACHUSETTS	*In re: Massachusetts Asbestos Cases*, M.B.L. Nos. 1 & 2 (D. Mass. Sept. 28, 1982) (Magistrate DiGiacomo) (J-M and UNARCO severed out of all cases pending in Massachusetts federal court). A motion for reconsideration has been filed.
MICHIGAN	In *Agan, et al.* v. *Johns-Manville Sales Corp.*, Case No. 81 127411 NP (Mich. Cir. Ct. Wayne County, Sept. 17, 1982), Judge O'Hair has refused to grant a stay and ruled J-M was not an indispensable party. He did, however, immediately certify the question for interlocutory appeal. (These cases have subsequently been removed to Bankruptcy Court.)
MISSOURI	*Maples* v. *Johns-Manville Sales Corp.*, CV 79-2819 (Mo. Cir. Ct. Oct. 18, 1982) (Levitt, J.) (motion for stay denied).
	In *Gill* v. *Johns-Manville Sales Corp.*, No. 82-5018-CI-SW-4 (W.D. Mo. Oct. 12, 1982), Judge Clark has "deferred" a motion to stay until it is determined whether Johns-Manville has liability insurance. In the interim, he has ordered discovery to continue.
NEW JERSEY	In *Barry* v. *Johns-Manville Corp.*, Civ. Nos. 77-1223 (D.N.J. Sept. 23, 1982), Judge Ackerman has denied a stay in all cases assigned to him.
	On October 5, 1982, in the United States District Court in Camden,

Judge Brotman issued an order denying a stay and severing J-M from the 12 lawsuits pending in his jurisdiction.

In *In re: Asbestos Litigation* (N.J. Super. Ct. Sept. 24, 1982), applicable to all cases pending in New Jersey Superior Court, Judge Keefe denied all applications for a stay, with the exception of suits arising out of the Manville plant, which are stayed until December 31, 1982.

NEW YORK

In federal court in Albany, Judge Miner has ruled that the stay as to JM and Unarco does not apply to other defendants, and will permit discovery to continue.

NORTH CAROLINA

In *In re: Asbestos-Related Cases*, *No. 81-CP-1 (E.D.N.C. Sept. 13,* 1982), Magistrate Leonard has denied motions for a stay. Defendants have filed a Notice of Appeal to Chief Judge Dupree.

OHIO

Doan v. *Johns-Manville Sales Corp.*, No. 008534 (Ohio Common Pleas, Cuyahoga County, Aug. 30, 1982) (remaining defendants ordered to trial).

Lynch v. *Johns-Manville Sales Corp.*, Civ. No. C-1-82-358 (S.D. Ohio Oct. 5, 1982) (motion for stay denied; Judge Spiegel certified the question for immediate appeal, and petition for leave to appeal to the Sixth Circuit has been filed).

OKLAHOMA	In the United States District Court for the Northern and Western Districts of Oklahoma, District Court Judge Brett has informally informed counsel that he intends to go forward in all cases without Johns-Manville. There is as yet no formal ruling.
PENNSYLVANIA	In *Matthews* v. *Johns-Manville Corp.*, No. 4052 (Pa. Common Pleas Sept. 24, 1982), Judge Takiff has severed J-M and Unarco. Judge Takiff has ordered that, upon the filing of a praecipe by a party in any other case, the debtors will similarly be severed from that case. In *In re: Asbestos Litigation*, Misc. No. 8482 (W.D. Pa. Oct. 14, 1982), Judge Diamond has lifted a temporary stay as to all parties except Unarco and Johns-Manville, and has refused to certify the question for appeal.
RHODE ISLAND	*In re: Rhode Island Asbestos Cases*, RIML No. 1P (D. R.I. Oct. 12, 1982) (Pettine, J.) (Johns-Manville and Unarco severed out of all cases pending before him).
SOUTH CAROLINA	In the Barnwell County Court of Common Pleas, Judge Smith has ruled that discovery should proceed unabated until further order or clarification of the scope of the stay from the bankruptcy courts.
TEXAS	On September 6, 1982, the Fifth Circuit refused to issue a writ of mandamus against an order of Judge Justice severing Johns-Manville and Unarco.

Vickery v. *Johns-Manville Sales Corp.*, MO 82 CA 57 (W.D. Tex. Sept. 15, 1982) (Bunton, J.) (stay held to apply only to debtors).

In the Eastern District of Texas, Judge Parker has severed J-M and Unarco in approximately 20 consolidated cases set for trial in Marshall on October 25.

VIRGINIA

Judge McKenzie in the Eastern District of Virginia has denied a stay for all parties in the *Robertson* and *Riddick* cases, which were set for September 13, 1982. Cases settled before trial.

WASHINGTON

In the United States District Court for the Western District of Washington, Judge Tanner has denied a stay and severed J-M and Unarco.

Paine v. *Johns-Manville Sales Corp.*, Pierce County No. 296654 (Wash. Super. Ct. Oct. 1, 1982) (stay denied).

UNARCO

- *Kindle* v. *Fibreboard Corp.*, No. TY-79-35-CA (E.D. Tex. Aug. 12, 1982) (Justice, J.), *writ of mandamus denied*, *In re Raybestos-Manhattan, Inc.*, No. 82-2339 (5th Cir. Aug. 20, 1982)
- *Doan* v. *Johns-Manville Sales Corp.*, No. 008534 (Ohio Common Pleas, Cuyahoga County, Aug. 13, 1982)
- *McDonald* v. *Johns-Manville Sales Corp.*, No. IP 81-557-C (S.D. Ind. Aug. 24, 1982) (Godich, J.)
- *Walters* v. *Unarco Industries, Inc.*, Civ. No. H 80-94 (N.D. Ind. Aug. 19, 1982)
- *St. Jacque* v. *Johns-Manville Corp.*, C 137 465 (Aug. 12, 1982) (Markey, J.)

- Bolton v. Nautilus Petroleum Carriers, Civ. No. 82-0033 (E.D. La., Aug. 16, 1982)
- Orum v. Sinclair Refinery Co., Civ. No. 80-1251 (E.D. La. Aug. 12, 1982)
- Drum v. Sinclair Refining Co., Civ. No. 80-1251 (E.D. La. Aug. 11, 1982)
- Judge Brown of the San Francisco Superior Court and Judge McCullum of the Alameda County Superior Court have held that the automatic stay applied only to Unarco.
- McCarty v. Johns-Manville Sales Corp., Civ. No. 579-0316(R) (S.D. Miss. Sept. 13, 1982)

UNARCO DISMISSED (w/o prejudice)

- Tamplin v. Fibreboard Corp., Civ. No. B-81-655-CA (E.D. Tex. Aug. 26, 1982) (Fisher, J.).
- Doan v. Johns-Manville Sales Corp., No. 008534 (Ohio Common Pleas, Cuyahoga County, Aug. 1982).

Senator DOLE. Our next witness will be Assistant Attorney General Jonathan Rose.

Mr. Rose, we have been hearing witnesses on the Manville bankruptcy. I am not certain you want to get into that.

STATEMENT OF JONATHAN C. ROSE, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE

Mr. ROSE. Good morning, Mr. Chairman.

Senator DOLE. If you have any comments, we would be glad to put them in the record. If not, we will move on to the bankruptcy code amendments, which you have a more immediate interest in, although I know you have an interest in the other. And I would suggest to Justice, as they work with us on the Manville bankruptcy problem, to see if we cannot come up with some program or some resolution of a very important matter that I do not think we will ever address unless we have a lot of help from the administration, those who are directly involved, and a bipartisan effort in the Congress.

Mr. ROSE. Mr. Chairman, we are working in the administration to develop a position on this matter and we would be glad to work with the committee.

Senator DOLE. You have, of course, a direct interest representing the Government, but I think even there you can set that aside and help us.

Mr. ROSE. We will be glad to do that.

Senator DOLE. If you could summarize your statement, we would appreciate it.

Mr. **Rose**. I am pleased to be here, Mr. Chairman, and I will try to make the main points of my statement fairly briefly, and I would like permission to submit my written statement for the record and a couple of attached exhibits, if I might.

Senator **Dole**. They will be made a part of the record.

Mr. **Rose**. The Supreme Court's decision in the *Northern Pipeline Construction Co.* case has determined that the article I bankruptcy courts created by the 1978 Bankruptcy Reform Act cannot constitutionally exercise the broad jurisdiction conferred upon them by that act. Because the Supreme Court's stay of that decision expires on December 4, 1982, there is very little legislative time to adopt a constitutional and workable bankruptcy court system.

I would like to make clear at the outset that I cannot overstate the need for the enactment of remedial——

Senator **Dole**. Mr. Rose, I think you said December 4; I think it is the 24th.

Mr. **Rose**. December 24; I am sorry. That is correct, Mr. Chairman.

I would like to make clear at the outset that I cannot overstate the need for the enactment of remedial legislation before the Supreme Court stay expires. The plurality and concurring opinions in the *Northern Pipeline* case have left many important questions unanswered, and the extent to which the bankruptcy courts and the district courts will be able to adjudicate bankruptcy matters after December 24 is quite unclear.

We have reviewed the proposed district court local rule promulgated by the administrative office of the U.S. courts to govern the operation of bankruptcy courts after December 24 if no legislation is adopted.

The proposed rule assigns to the bankruptcy courts in each district the district court's jurisdiction over bankruptcy matters, except that the district courts must review de novo any proposed judgment of a bankruptcy court in any proceeding related to but not arising under a case under title XI.

We are uncertain whether this proposed rule would withstand a judicial challenge. The assumption on which the proposed rule is based—that the Court's decision has left untouched the broad bankruptcy jurisdiction conferred upon the district courts by section 241(a) of the act in 28 U.S.C. 1471 (a) and (b)—is open to some doubt.

Furthermore, there are serious questions whether the proposed rule legitimately may assign to the bankruptcy courts significant portions of the district courts' broad bankruptcy jurisdiction under the act, since this is precisely what the Court refused to do in holding that the jurisdiction which the bankruptcy courts cannot constitutionally exercise could not be severed from the remainder of the bankruptcy court jurisdiction conferred under the 1978 act.

If the district courts recognize the problems with the rule and withdraw the reference of many bankruptcy matters from the district courts, or attempt to review de novo large numbers of bankruptcy matters, the resulting delays will severely hinder the operation of the bankruptcy system. Over 700,000 bankruptcy estates and 100,000 adversary proceedings currently are pending, and 10,000 new bankruptcy petitions are being filed each week.

On the other hand, if the district courts permit the bankruptcy courts to adjudicate a broad range of cases and proceedings pursuant to this suggested local rule, there is a substantial risk that these cases and proceedings will have to be relitigated if the local rule is found invalid.

Under either alternative, the bankruptcy court system will operate under a cloud of uncertainty which will impede the administration of bankruptcy cases, particularly large commercial bankruptcies or reorganizations. Nor can we rely on the prospect of a further stay from the Supreme Court. As a practical matter, the deferral of this issue until the next Congress would make final action by the Congress unlikely before late spring—a delay the Court cannot be expected to countenance.

Thus, it is essential that remedial legislation to deal with the *Northern Pipeline* decision be enacted before the end of the current session. The disruption of the bankruptcy court system would ultimately result in the loss of millions of dollars and thousands of jobs as reorganization of our Nation's productive resources are delayed by the legal uncertainties I have mentioned.

Mr. Chairman, I will just simply conclude my remarks by quoting from a letter that was sent to the President on October 29, 1982, from the chairman and chief executive officer of the Wickes Co. in Santa Monica, Calif. I would just like to quote a couple of paragraphs from this letter because I think it illustrates the kind of problem that we can expect if the Congress fails to take action:

> Dear Mr. President, as I expect you know, Wickes sought protection under the bankruptcy laws on April 24, 1982. We took this drastic legal step after only being convinced that the bankruptcy reorganization was essential in order to turn around Wickes' economic affairs, thereby benefiting our employees, our investors and our creditors.
>
> Wickes is a major business. We are, for the most part, retailers to the vast middle class of America's heartland and suppliers to our Nation's depressed housing industry. We employ 32,000 men and women at more than 3,000 locations in 47 States and several foreign countries. Annual sales during fiscal 1982 exceeded $3.8 billion.
>
> The Wickes family of companies includes four public reporting companies. Until recently, Wickes stock was traded on the New York Stock Exchange. Fourteen separate bond issues, representing over $500 million in debt, are held widely by small, public investors. Nearly 50 banks and thousands of vendors are owed another $1.2 billion.
>
> But what we thought was in reach now seems very much in jeopardy because of the uncertainty surrounding bankruptcy law. That uncertainty is caused by the Supreme Court's Marathon decision in June of this year.
>
> The Supreme Court gave Congress a choice: either upgrade the status of bankruptcy judges or restrict bankruptcy courts' jurisdiction. Congress has until December 24, 1982, to adopt curative legislation. Frankly, unless Congress is prodded into action now, I fear the Wickes reorganization and many other reorganization proceedings may be threatened, increasing the likelihood of liquidation and the disruptive reallocation of capital and labor resources that would ensue.
>
> I recognize that insolvency interests both in and out of the government may be eager to adopt substantive bankruptcy law amendments, but those issues are not facing a deadline. Bankruptcy court jurisdiction, on the other hand, already has been ruled unconstitutional. It is a needless temptation of judicial fate to expect that a Supreme Court that has twice stayed its judgment for the express purpose of permitting passage of remedial legislation will forebear a third time in the face of congressional inaction.
>
> Uncertainty, time delays, duplication in litigation—these are the enemies of all involved in a business reorganization, be they management, debtors, or creditors. To save a business requires swift and decisive action. Strengths must be consolidated. Losses must be cut. Prompt responses are required. It is a lesson I have learned in helping heal other ailing companies.

A specialized bankruptcy court in one forum with the power to treat all aspects of a reorganization is essential to the reorganization process.

Without positive action by the 24th of December, bankruptcy procedures will be placed in a state of confusion even worse than the conditions giving rise to reform in the first place. Yet, Wickes will be faced with that prospect if the Congress fails to act by December 24. Frankly, it is hard for me to think that district courts will be able to handle this problem.

Senator DOLE. We will make that a part of the record, if it is all right.

Mr. ROSE. Very good.

Mr. Chairman, I will only conclude by saying we think it is clear that that kind of situation and many others like it will be very much hindered if we cannot get action on the kind of legislation you have pending.

Senator DOLE. Well, I hope we can work out some agreement with Congressman Rodino and members of his committee. There are a lot of different ideas on how we ought to approach this problem, but we do not have much time. That may be one reason we will approach it and at least try to resolve it when we come back here.

I do have a number of questions; I am going to have to submit those in writing, if I might, because I am going to have to leave here very quickly and we still have two distinguished judges to hear from.

So if it is all right with you, I will submit the questions in writing. In fact, I can hand them to you as you leave.

Mr. ROSE. Fine.

Senator DOLE. Thank you.

Mr. ROSE. Thank you.

[The prepared statement and additional submissions of Mr. Rose follow:]

STATEMENT

OF

JONATHAN C. ROSE
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY

CONCERNING

OMNIBUS BANKRUPTCY AND COURT REFORM LEGISLATION

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear before you to present the views of the Department of Justice on the several legislative proposals to restructure the Nation's bankruptcy court system. As you are well aware, the Supreme Court's decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858 (1982), has determined that the system of Article I bankruptcy courts */ created by the 1978 Bankruptcy Reform Act cannot constitutionally exercise the broad jurisdiction conferred on them by that Act. On October 4, 1982, the Supreme Court agreed to extend its stay of that decision until December 24, 1982. This leaves very little legislative time to adopt a constitutional and workable bankruptcy court system.

I would like to make clear at the outset that I cannot overstate the need for the enactment of remedial legislation before the Supreme Court's stay expires. The plurality and concurring opinions in the Northern Pipeline case have left many important questions unanswered, and the extent to which the bankruptcy courts and the district courts will be able to adjudicate bankruptcy matters after December 24 is highly unclear. Some have, indeed, questioned whether *any* court will have jurisdiction over bankruptcy matters after December 24. While we believe it is likely that some bankruptcy jurisdiction would remain in the district courts after December 24, */ it is less clear that the district courts would retain the broad jurisdiction created by the 1978 Bankruptcy Reform Act over matters "related to" bankruptcy issues.

---

*/ Article I courts are legislative courts established by the Congress to be manned by judges without the protection against salary dimunition and without life tenure.

The Administrative Office of the United States Courts has promulgated a proposed district court local rule to govern the operation of the bankruptcy courts after December 24 if no legislation is adopted. The proposed rule assigns to the bankruptcy courts in each district the district court's jurisdiction over "[a]ll cases under Title 11 and all civil proceedings arising in or related to cases under Title 11." Proposed Rule (b)(1). District courts are authorized to withdraw any reference to a bankruptcy judge, in whole or part, upon the court's own motion or the motion of a party. Id., (b)(2). In addition, the district courts must review de novo any proposed judgment of a bankruptcy court in any proceeding "related to" but not "arising under" a case under Title 11 and in any other proceeding where such de novo review is constitutionally required. Id., (c)(3), (c)(5)(A)(iii), (c)(5)(B). However, the proposed rule does not define those other cases in which district court de novo review is constitutionally required.

We are uncertain whether the proposed rule would withstand a judicial challenge. The proposed rule is based on the assumption that the Court's decision has left untouched the broad bankruptcy jurisdiction conferred upon the district courts by Section 241(a) of the Act, in 28 U.S.C. 1471(a) and (b). In fact, it is unclear whether the Court's holding may be limited in

---

*/ Various arguments have been presented in favor of the conclusion that bankruptcy jurisdiction will return to the district courts after December 24. See Bankruptcy Court Act of 1982, H.R.Rept. No. 97-807, 97th Cong., 2d Sess. 30-49 (1982) ("House Report"). The clearest case, however, is made by 28 U.S.C. 1334, which provides that "[t]he district courts shall have original jurisdiction *** of all matters and proceedings in bankruptcy." Although § 1334 was amended by Section 238(a) of the 1978 Act, 92 Stat. 2668, to limit district courts to appellate bankruptcy jurisdiction, those amendments do not take effect until April 1, 1984. See § 402(b) of the Act, 92 Stat. 2682.

that fashion. See 102 S. Ct. at 2880 n.40 (plurality opinion); id. at 2882 (Rehnquist, J., concurring). Furthermore, there are serious questions whether the proposed rule legitimately may assign to the bankruptcy courts significant portions of the district courts' broad bankruptcy jurisdiction under the Act, since this is precisely what the Court refused to do in holding that the jurisdiction which the bankruptcy courts cannot constitutionally exercise could not be severed from the remainder of the jurisdiction conferred on the bankruptcy courts under the 1978 Act.

We have no confidence that the proposed rule will be proven an effective interim remedy to the bankruptcy court crisis, thereby enabling the Congress to take more time to determine how it wishes to resolve this matter. The permissible scope of district court jurisdiction over bankruptcy matters would, of course, be subject to substantial litigation before it could be firmly settled. Even more extensive and difficult litigation would be required to determine which questions could be safely delegated to the bankruptcy courts and which would have to be heard *de novo* by the district courts.

If district courts recognize the problems with the rule and withdraw the reference of many bankruptcy matters from the bankruptcy courts or attempt to review *de novo* large numbers of bankruptcy matters, the resulting delays will severely hinder the operation of the bankruptcy system. The district courts are not at present capable of expeditiously handling both their own large workloads and the enormous volume of bankruptcy matters. Over 700,000 bankruptcy estates -- and 100,000 adversary proceedings -- currently are pending. New bankruptcy petitions are being filed at the rate of more than 10,000 per week. */

On the other hand, if the district courts permit the bankruptcy courts to adjudicate a broad range of cases and proceedings pursuant to the local rule, there is a substantial risk that these cases and proceedings will have to be relitigated if the local rule is found invalid. Under either alternative, the bankruptcy court system will operate under a cloud of uncertainty. In light of such jurisdictional uncertainty, it would be especially difficult to proceed with any large commercial bankruptcies or reorganizations, where debtors, creditors, and purchasers of assets must be able to rely on the validity of the bankruptcy court's orders and cannot proceed subject to the risk of judicial invalidation of their acts.

---

*/ Administrative Office of the United States Courts, 1982 Annual Report of the Director, 8, 10 (preliminary ed., September 22, 1982).

In short, we do not believe that the bankruptcy court system can operate effectively after December 24 in the absence of remedial legislation. The disruption of this system would ultimately result in losses of millions of dollars and thousands of jobs, as reorganizations of our nation's productive resources are delayed by the legal uncertainties outlined above.

Nor can we rely on the prospect of a further stay from the Supreme Court. The Court's stay has been extended once, to coincide with the adjournment of this Congress, almost six months after the Court's decision. As a practical matter, the deferral of this issue until the next Congress would make final action by Congress unlikely before the late spring, a delay the Court likely will not countenance.

Thus, it is essential that remedial legislation to deal with the Northern Pipeline decision be enacted before the end of the current session.

II.

In view of the strong opposition of the Judicial Conference and others to the establishment of an Article III court of specialized jurisdiction for bankruptcy matters, the

Department initially had attempted to develop an Article I solution that was both workable and constitutional. Unfortunately, our extensive review has led to the conclusion that we cannot recommend to the Congress any Article I solution that is either workable as a practical matter or sufficiently free of constitutional doubt.

One Article I solution has been proposed by the Judicial Conference. Under this proposal, jurisdiction over all cases under title 11 and "subsidiary proceedings" would be vested in the district courts, and those matters would be referred to the bankruptcy court for the district for disposition. The district court, on its own motion or the motion of a party, would be able to recall any case referred to the bankruptcy court, either for determination or for reference to a magistrate. "Related proceedings" to the case under title 11 would not be referred to the bankruptcy court but would be decided by the district court.

It is very difficult to determine from the opinions filed in Northern Pipeline exactly what aspects of bankruptcy proceedings might or might not be constitutionally adjudicated by a non-Article III tribunal. The rationales advanced by both the plurality opinion and the concurring opinion are, however, sufficiently sweeping that it is doubtful that the proposal to reestablish an Article I bankruptcy court advanced by the Judicial Conference would provide a workable bankruptcy tribunal that would be both effective and capable of withstanding constitutional scrutiny.

The plurality opinion of four justices distinguished between "public rights" which may be adjudicated by an Article I tribunal and "private rights" which may not. That opinion did not delineate what constitutes "public rights" but noted generally that they must at a minimum arise "between the government and others." 102 S. Ct. at 2870. By contrast, private rights, which must be adjudicated by Article III courts, are those involving "the liability of one individual to another." 102 S. Ct. at 2870-71. Though some aspects of bankruptcy proceedings may involve matters of "public right," the adjudication of creditors' claims against a bankrupt, which is at issue in many bankruptcy proceedings, would seem to involve primarily the "private rights" of the parties.

The concurring opinion of Justices Rehnquist and O'Connor was expressly limited to the particular type of claim involved in the case (i.e., a bankrupt's common law claim against a third party uninvolved in the bankruptcy proceeding). Nevertheless, the rationale advanced is in some respects no less sweeping than that of the plurality opinion. Justice Rehnquist's opinion suggests that matters arising under state law, as well as "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," must be tried by Article III courts. 102 S. Ct. at 2881. This could entail a vast number of matters in and related to bankruptcy.

The Judicial Conference has argued that the decision in Northern Pipeline should be read to require only that actions at common law arising under state law must be decided by an Article III tribunal. */ It is apparently the view of the Judicial Conference that matters "arising under" bankruptcy law do not entail issues of state common law and, accordingly, may be constitutionally considered by an Article I tribunal.

The analysis and proposal offered by the Judicial Conference present a number of problems. First, we would not advise Congress to base its legislative solution to this problem on the speculation that the more narrow construction of Northern Pipeline advanced by the Judicial Conference will ultimately

---

*/ Report of the Judicial Conference of the United States on Northern Pipeline Construction Co. v. Marathon Pipe Line Co., and Proposals for Remedial Congressicnal Action, 11 (1982).

prevail in the Supreme Court. Second, even under the construction of Northern Pipeline advanced by the Judicial Conference, there may be significant constitutional problems in attempting to adjudicate a large proportion of the matters "arising under" bankruptcy law in an Article I tribunal. Cases arising under bankruptcy law frequently entail consideration of state law or traditional common law issues in many different contexts. To cite an obvious example, proofs of claim offered by a claimant against a bankrupt will generally be predicated on state law (of contract, property, domestic relations, etc.). It is arguable that, even under the construction of Northern Pipeline offered by the Judicial Conference, state law issues concerning proofs of claims could not be adjudicated by an Article I tribunal. */

Finally, the Judicial Conference proposal would reduce the efficiency of the bankruptcy system established in 1978 by bifurcating proceedings between an Article I and an Article III tribunal. One of the most important purposes of the 1978 reforms was the consolidation of bankruptcy proceedings before a single forum with jurisdiction over all relevant matters. This put an end to costly delays and jurisdictional litigation which had plagued bankruptcy adjudication prior to 1978. The bifurcated system proposed by the Judicial Conference would resurrect some of these same problems. Moreover, it would place an additional caseload of uncertain dimensions on already overcrowded district court calendars.

For these reasons, the Department has concluded that only an Article III approach will provide the workable and constitutional solution that is essential to assure the continued integrity of the bankruptcy system. Grave constitutional doubts would surround any further temporizing with an Article I solution

---

*/ In their letter of September 20, 1982 to the Chairman, Professors Countryman, Kennedy and King present a more extensive analysis of such problems.

and would cast a shadow on all bankruptcy cases raising the possibility of a new ruling that such a bankruptcy court structure is unconstitutional. In our judgment, a legislative proposal that simply offers an opportunity for more litigation to test its constitutional validity is no solution at all. The appointment of Article III judges will resolve any constitutional concerns, allow the consolidated disposition of all related bankruptcy matters, and attract the highest caliber of lawyers to the bench.

III.

Once a decision is made in favor of the Article III approach, there are two possible approaches to consider. One approach, reflected in H.R. 6978, as reported by the House Judiciary Committee, is to constitute the bankruptcy courts as Article III courts independent of the existing district courts. The other approach is reflected in H.R. 7294 (introduced by Rep. Butler) and in the unnumbered Senate amendments. It would provide for the appointment of additional Article III judges to sit in a new bankruptcy division of each federal district court. For the reasons I summarize below, the Department of Justice favors the second alternative, the creation of bankruptcy divisions of the district courts.

Although H.R. 6978 would resolve with finality the constitutional infirmities of the 1978 Act, it also presents a number of disadvantages that many commentators and legislators -- including members of this committee -- have sought to avoid. Specifically, H.R. 6978 would create a completely new system of Article III courts with specialized subject matter jurisdiction. This would be a dramatic departure from the historic practice of federal trial courts of general jurisdiction. Moreover, the appointment of a fixed number of specialized judges in each district may result in undesirable rigidity and inefficiency as the bankruptcy caseloads in each district change over time. Further, because these courts would be limited solely to bankruptcy matters and would not have the prestige of district courts, the breadth and caliber of candidates available for appointment to these courts would be adversely affected.

In other respects as well, the approach has drawbacks. The creation of separate bankruptcy courts in each district, together with separate clerks and other officers, would inevitably result in duplication and inefficiency. There is considerable merit to the argument against creating a new Article III court system which, in some sense, would compete with the existing district court system.

Upon careful consideration, the Department of Justice favors the bankruptcy division approach reflected in Representative Butler's bill and in the proposed Senate amendments. This approach, we feel, will retain the advantages of an Article III approach while avoiding some of the disadvantages of an independent bankruptcy court system.

This approach would establish a bankruptcy division of the district court in each district to hear all matters relating to bankruptcy. In recognition that the existing district courts would be unable to manage the large volume of bankruptcy filings, the bills would provide for the appointment of 227 additional district judges who would principally handle bankruptcy matters. These district judges would have the same rights and privileges provided by law for district judges. To the extent that they were not needed to handle bankruptcy matters, the judges could be assigned to hear other cases in the district court or designated to sit on other courts. The bills, however, would allow such designation and assignment of district judges in the bankruptcy divisions only where the disposition of bankruptcy matters will not be delayed.

This approach will promote specialized expertise among judges in the bankruptcy divisions of the district courts, assuring that bankruptcy matters will be handled promptly and expeditiously by Article III district judges familiar with bankruptcy law. The assignment of district judges specifically to the bankruptcy divisions will assure that bankruptcy matters will be kept separate from the backlog of civil and criminal cases in the district court and unaffected by the Speedy Trial Act and other laws requiring priority for certain criminal and civil cases. At the same time, the approach would allow the efficient integration of the workload and judicial resources of the courts, under the general management of the chief judges of the district and the circuit, by allowing assignment of non-bankruptcy matters to bankruptcy division judges when this will not interfere with the expeditious handling of bankruptcy matters.

In other respects, H.R. 7294 and the Senate amendments closely resemble H.R. 6978, and the provisions of the 1978 Act upon which it is based. Except for conforming changes reflecting the establishment of bankruptcy divisions of the district courts rather than independent bankruptcy courts, all three bills are essentially identical with respect to jurisdiction, venue, and appeals.

Finally, H.R. 7294 and the Senate amendments would create a system of interim bankruptcy courts for the transition period beginning on the date of enactment and ending on September 30, 1983. These provisions are essentially identical to H.R. 6978, except that the effective date of the permanent court system is appropriately moved from April 1 to October 1, 1983, to accommodate the delays and difficulties inherent in nominating and confirming the additional judges. In addition, the retirement provisions for transitional bankruptcy judges not appointed as permanent judges are amended to conform to the provisions for Congressional pensions.

IV.

Before I conclude, I would like to comment briefly on the provisions contained in H.R. 7294 and in the Senate amendments with respect to the United States trustees program.

The current United States trustees program is a pilot program established by the 1978 Act in selected judicial districts and is scheduled to terminate in 1984. The purpose of this program is to facilitate the disposition of bankruptcy cases by relieving the bankruptcy judges of some of the administrative burden and vesting those duties in the United States trustee, who is appointed and supervised by the Attorney General.

The bills would transfer jurisdiction of the program from the Attorney General to the Judicial Branch. The Department of Justice endorses that transfer, since the function of the United States trustees -- to assist in the administration of bankruptcy cases -- seems more appropriately vested in the Judicial than the Executive Branch. The bills would establish an independent Administrative Center of the United States Trustees to exercise this function. We note, however, that 28 U.S.C. § 604(f) presently authorizes the Director of the Administrative Office of the United States Courts to appoint and supervise private trustees in districts where the United States trustee program is not applicable. For this reason, the Subcommittee may wish to consider vesting supervisory functions over the United States trustees in the existing Administrative Office, rather than in a newly-created independent office.

In addition, the bills would expand the United States trustee program to a permanent, nationwide basis, with the appointment of a United States trustee in any district in which the district judges in the bankruptcy division so request, and also would expand somewhat the authority of the United States trustees. We take no position at this time on the advisability of those legislative proposals to broaden the program. We note that an evaluation of the entire program is currently under way, as required by the 1978 Act, but this review will not be completed for another year. We are awaiting the results of this evaluation before taking a position on substantive amendments to the United States trustee program.

V.

There are numerous other provisions of the Senate amendments. Some, the Administration has supported in the past as separate legislation, but others we have opposed. We must note, for instance, our strong objection to the amendments to § 403(e) of the Bankruptcy Reform Act of 1978 (Pub. L. 95-598), which are contained in § 352 of H.R. 7294. These provisions are derived from H.R. 4353, which was vetoed by the President on December 29, 1981, and H.R. 5116, which we have also opposed. In addition, as we stated in our letter to the Committee of July 29, 1981 regarding S. 537, we oppose the creation of a State Justice Institute, as provided in Title I, subtitle D. There may be other provisions in this lengthy bill on which we have taken no position that may also be troublesome.

To our mind, the essential necessity is for legislation establishing a constitutionally sustainable bankruptcy court system by December 24. We would not object to the inclusion of additional noncontroversial proposals on other matters. However, a legislative solution to the Northern Pipeline decision must not be blocked by those with extraneous legislative objectives.

That concludes my prepared remarks, Mr. Chairman. I would be pleased to answer the questions you and the members of the Subcommittee may have.

U.S. Department of Justice
Office of Legal Policy

Assistant Attorney General
Washington, D.C. 20530

November 18, 1982

The Honorable Robert J. Dole
Chairman
Subcommittee on Courts
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I am pleased to respond to your request to submit written answers to your questions regarding proposed legislation restructuring the bankruptcy court system. I only regret that the pressure of time prevented me from discussing these issues with you at the hearing.

In most respects, I believe that my prepared statement anticipated your questions. To avoid unnecessary repetition, I will refer to my prepared statement where appropriate.

> 1. What do you think of the provisions of Congressman Rodino's bill which give Article III status to bankruptcy judges, but sets their pay at approximately 90% of district court judge's salaries?

Response: As I indicated in my statement, the provisions in H.R. 6978 creating an independent Article III Bankruptcy Court would resolve any constitutional doubts regarding the exercise of bankruptcy jurisdiction, but would also entail certain disadvantages that commentators and the Congress have sought to avoid. This would be a significant departure from the historic practice of federal trial courts of general jurisdiction. This set of specialized trial courts would, in some sense, inevitably compete with the existing district court system.

Apart from this general concern, we believe that H.R. 6978 presents two other disadvantages. First, the establishment of a fixed number of specialized Article III judges in each district may well result in undesirable rigidity and inefficiency as the bankruptcy caseloads (and district court caseloads) change over time. Second, because the bankruptcy judges would be limited to bankruptcy matters, and would not have either the prestige or the salary of district judges, the bankruptcy judgeships inevitably would be regarded as inferior positions relative to the district court. This would not only create the possibility of undesirable tension but would adversely affect the breadth and caliber of candidates available for appointment. Because the legal system depends on the appointment of well qualified candidates to the bench, we do not favor limitations on the powers or prestige of the bankruptcy judgeships which may diminish our ability to recruit the best candidates.

2. What do you think about the proposal of the Judicial Conference to retain Article I status for bankruptcy judges?

Response: This is a subject I discussed at some length in Part II of my prepared statement. For the reasons I outlined there, we can not support the Judicial Conference's legislative proposal as either workable in a practical sense or sufficiently free of constitutional doubt.

Our major concern with the Judicial Conference's proposal, or any other proposal that relies significantly on Article I judges, is the considerable doubt that such a system would pass constitutional muster. The Judicial Conference interprets the Supreme Court's decision as requiring only that actions at common law or arising under state law must be decided by Article III courts, and as not impairing the ability of Article I judges to determine issues "arising under" bankruptcy laws.

Although the plurality and concurring opinions do not state precisely what aspects of bankruptcy proceedings might or might not be constitutionally adjudicated by a non-Article III tribunal, those opinions do contain sufficiently sweeping language as to cast this assumption into doubt. Many issues that "arise under" bankruptcy law turn on or require consideration of the common law or applicable state law, and it is far from clear that Article I judges constitutionally may adjudicate such issues of state law.

At best, the Judicial Conference's legislative proposal is based on the speculation that its more narrow construction of the Northern Pipeline decision ultimately will prevail in the Supreme Court. We can not support this proposal, because, in our view, a legislative proposal that simply offers the certainty of further litigation to test its constitutional validity is no solution at all.

In addition to the constitutional concerns, we do not support the Judicial Conference's proposal because it would result in the bifurcation of bankruptcy proceedings between Article I and Article III tribunals and reduce the efficiency of the bankruptcy system established in 1978. One of the most important purposes of the 1978 reforms was the consolidation of bankruptcy proceedings before a single forum with jurisdiction over all relevant matters. This put an end to costly delays and jurisdictional litigation which had plagued bankruptcy adjudication prior to 1978. The bifurcated system proposed by the Judicial Conference would resurrect some of these same problems. Moreover, it would place an additional caseload of uncertain dimensions on already overcrowded district court calendars.

3. Should the U.S. Bankruptcy Trustee System be made permanent, as Congressman Butler's bill provides?

Response: The Department of Justice endorses the transfer of the United States trustee program from the Executive Branch to the Judicial Branch, in view of the role of the United States trustees -- to assist in the administration of bankruptcy estates.

We take no position at this time on the advisability of the provisions in H.R. 7294 to broaden the scope of the United States trustee to a permanent, nationwide program. As required by the Bankruptcy Reform Act of 1978, an evaluation of the entire program currently is under way, but the conclusions of this review will not be available until next year. We are awaiting the results of this evaluation before taking a position on substantive amendments to the United States trustee program.

4. If bankruptcy judges obtain district court status, should they be fungible and have the ability to handle non-bankruptcy matters if their docket permits? What about other district court judges, should they handle bankruptcy business if their dockets permit?

Response: The Department of Justice strongly endorses the provisions in H.R. 7294 which provide for the assignment of judges in the bankruptcy division to hear non-bankruptcy matters as their dockets permit, and for the assignment of other district judges to hear bankruptcy matters as necessary. This flexibility, or "fungibility", is one of the factors that led the Department to endorse the creation of bankruptcy divisions of the district courts. In this way, the workload of all of the trial judges in each district can be structured most efficiently.

The bill, H.R. 7294, specifically provides that judges in the bankruptcy division could be assigned non-bankruptcy matters, or could be designated to sit on other courts, only to the extent that this would not impair the expeditious determination of bankruptcy matters. This assures that the determination of bankruptcy matters will not be affected by the backlog of other cases pending in the district. However, to the extent that bankruptcy matters do not require the full time of the judges in the district's bankruptcy division, sound principles of judicial administration and economy require that those judges should be available to hear other cases and reduce the backlog of other civil and criminal matters in the district, or in other districts. By the same token, where the docket of other district judges permits, they should be available for assignment to hear bankruptcy matters as necessary to ease a backlog of cases in the bankruptcy division of a district court.

Allowing this flexibility of assignment, of both bankruptcy and non-bankruptcy cases within each district, under the general management of the chief judges of the district and circuit, we feel, is the only practical and common sense result. The failure to provide for this flexibility can only result in inefficiencies and judicial diseconomies in many if not most judicial districts.

Indeed, we note that H.R. 6978 as reported by the House Judiciary Committee also provides for flexibility of assignment in the context of separate bankruptcy and district courts. That bill provides for the designation of bankruptcy judges to sit on the district court, and vice versa. We support this provision, although we feel that the bankruptcy division approach is an even better means of promoting judicial economy.

5. Do you favor a proposal for the establishment of the Intercircuit Tribunal, a feature of the Butler bill and the Senate amendment package?

Response: These bills would create for a five-year trial period an Intercircuit Tribunal, composed of circuit judges temporarily assigned from the Courts of Appeals to hear and render nationally binding decisions in cases referred to it by the Supreme Court. This proposal, initially introduced as H.R. 4762, is similar to other proposals advanced by a number of legal writers. */

We do not believe that a sufficient case for this type of significant alteration of the federal judicial system has been

---

*/ See Leventhal, A Modest Proposal for a Multi-Circuit Court of Appeals, 24 Am. U. L. Rev. 881 (1975); Cutler, "Help for High Court," N.Y. Times, Nov. 1, 1982, at A-19.

made at this time. However, we note that this might be an appropriate subject for consideration by the proposed Federal Courts Study Commission, if such a commission is created as provided in the bills.

> 6. What will happen, in your view, should the Congress fail to meet the December 24th deadline imposed by the Supreme Court in the Northern Pipeline case? Is it reasonable to expect that the Court would grant an additional extension of its stay?

This is a subject I have discussed at some length in Part I of my prepared statement and in my oral remarks. As I stated at that time, the plurality and concurring opinions in the Northern Pipeline case have left many important questions unanswered, and the extent to which the bankruptcy courts and the district courts will be able to adjudicate bankruptcy matters after December 24 is unclear. Some have, indeed, questioned whether any court will have jurisdiction over bankruptcy matters after that date.

It is likely that, if presented with the issue at that time, the courts ultimately will hold that the district courts would retain jurisdiction over bankruptcy matters. We believe that the Supreme Court's Northern Pipeline decision only invalidated the grant of jurisdiction to the bankruptcy courts in 28 U.S.C. § 1471(c), and did not invalidate the grant of jurisdiction to the district courts in § 1471(a) and (b). Moreover, 28 U.S.C. § 1334 currently provides that "[t]he district courts shall have original jurisdiction * * * of all matters and proceedings in bankruptcy." */

However, the conclusion that the district courts would retain bankruptcy jurisdiction, and the scope of that jurisdiction, are not free from doubt. The permissible scope of district court jurisdiction over bankruptcy matters would be subject to substantial litigation before it could be firmly settled.

Furthermore, there are serious questions whether significant portions of the district courts' broad bankruptcy jurisdiction under the Act legitimately may be assigned to the bankruptcy courts, since this is precisely what the Court refused to do in holding that the jurisdiction which the bankruptcy courts cannot constitutionally exercise could not be severed from the remainder of the jurisdiction conferred on the bankruptcy courts under the 1978 Act. Even more extensive and difficult litigation would be required to determine which questions could be safely delegated to the bankruptcy courts and which would have to be heard de novo by the district courts.

If the district courts attempted to review de novo large numbers of bankruptcy matters, the resulting delays would severely hinder the operation of the bankruptcy system. The district courts are not at present capable of expeditiously handling both their own large workloads and the enormous volume of bankruptcy matters. Over 700,000 bankruptcy estates -- and 100,000 adversary proceedings -- currently are pending. New bankruptcy petitions are being filed at the rate of more than 10,000 per week. **/ On the other hand, if the district courts referred a broad range of cases and proceedings to the bankruptcy courts for adjudication, there is a substantial risk that these cases and proceedings would have to be relitigated if the delegation of authority is found invalid.

---

*/ Although § 1334 was amended by § 238(a) of the 1978 Bankruptcy Reform Act, 92 Stat. 2668, to limit district courts to appellate bankruptcy jurisdiction, those amendments do not take effect until April 1, 1984. See § 402(b) of the Act, 92 Stat. 2682.

**/ Administration Office of the United States Courts, 1982 Annual Report of the Director, 8, 10 (preliminary ed., September 22, 1982).

In any event, the bankruptcy court system would operate under a great cloud of uncertainty. In light of such jurisdictional uncertainty, it would be especially difficult to proceed with any large commercial bankruptcies or reorganizations, where debtors, creditors, and purchasers of assets must be able to rely on the validity of the bankruptcy court's orders and cannot proceed subject to the risk of judicial invalidation of their acts. Enclosed are copies of a letter from the Chairman of the Wickes Companies, who details the great impact of these uncertainties on pending reorganizations, and, as you requested, the Motion to Extend Stay of Mandate filed by the Solicitor General in the Supreme Court.

In short, we do not believe that the bankruptcy court system can operate effectively after December 24 in the absence of remedial legislation. The disruption of this system would ultimately result in losses of millions of dollars and thousands of jobs, as reorganizations of our nation's productive resources are delayed by the legal uncertainties outlined above.

Nor can we rely on the prospect of a further stay from the Supreme Court. The Court's stay has been extended once, to coincide with the adjournment of this Congress, almost six months after the Court's decision. As a practical matter, the deferral of this issue until the next Congress would make final action by Congress unlikely before the late spring, a delay the Court likely will not countenance.

For these reasons, it is essential that remedial legislation to deal with the Northern Pipeline decision be enacted before the end of the current session.

Sincerely,

Jonathan C. Rose

Jonathan C. Rose
Assistant Attorney General

Enclosures

Wickes Companies, Inc.
Corporate Offices

3340 Ocean Park Boulevard, Suite 2000 • Santa Monica, California 90405 • (213) 452-0161

SANFORD C. SIGOLOFF
Chairman of the Board,
Chief Executive Officer
and President

October 29, 1982

82-1987
Received
OLP
11-3, 1982
cc:SJE File: Bankruptcy
~~REG~~
TJF
Jones Kamenar
Korp

The Honorable Ronald W. Reagan
The President of the United States
Washington, D. C.

Dear President Reagan:

Due to your expressed determination to build new strength into the American economy, I thought it might be helpful for me to share a rather special perspective with you—my perspective as Chairman of the Board and Chief Executive Officer of Wickes Companies, Inc., and its many subsidiaries and affiliates.

As I expect you know, Wickes sought protection under the bankruptcy laws on April 24, 1982. We took this drastic legal step only after being convinced that a bankruptcy reorganization was essential in order to achieve a turnaround of Wickes' economic affairs, thereby benefiting our employees, our investors, and our creditors.

Wickes is a major business. We are, for the most part, retailers to the vast middle class of America's heartland and suppliers to our Nation's depressed housing industry. We employ 32,000 men and women at more than 3,000 locations in 47 states and several foreign countries. Annual sales during fiscal 1982 exceeded $3.8 billion. The Wickes family of companies includes four public reporting companies. Until recently, Wickes' stock was traded on the New York Stock Exchange. Fourteen separate bond issues, representing over $500 million in debt, are widely held by small, public investors. Nearly fifty banks and thousands of vendors are owed another $1.2 billion.

But, what we thought was within reach now seems very much in jeopardy because of the uncertainty surrounding bankruptcy law. That uncertainty is caused by the Supreme Court's Marathon decision in June of this year. Marathon held that the broad jurisdiction granted to the bankruptcy courts could only be exercised by Article III judges who hold their office during good behavior without dimunition in compensation.

The Supreme Court gave Congress a choice—either upgrade the status of bankruptcy judges or restrict the bankruptcy court's jurisdiction. Congress has until December 24, 1982, to adopt curative legislation. Frankly, unless Congress is prodded into action now, I fear the Wickes reorganization and many other major reorganization proceedings may be threatened, increasing the likelihood of liquidation and the disruptive reallocation of capital and labor resources that would ensue.

In short, I write to ask that you once again—in the interest of American jobs and economic vitality—use your demonstrated persuasive powers with the Congress. Please urge the Senate and House of Representatives to enact a measure providing Article III status to the Nation's bankruptcy bench.

I recognize that insolvency interests both in and out of government may be eager to adopt substantive law amendments in a new bankruptcy bill, but those issues are not facing a deadline. Bankruptcy court jurisdiction, on the other hand, already has been ruled unconstitutional. It is a needless temptation of judicial fate to expect that a Supreme Court that has twice stayed its judgment for the express purpose of permitting passage of remedial legislation will forebear a third time in the face of Congressional inaction.

Uncertainty, time delays, duplication in litigation—these are the enemies of all involved in a business reorganization, be they management, debtors, or creditors. To save a business requires swift and decisive action. Strengths must be consolidated. Losses must be cut. Prompt responses are required. It is a lesson I have learned in helping heal other ailing companies.

With Wickes, for example, we began our chapter 11 reorganization effort with 21 separate debtors in an overall enterprise operating over 100 businesses. It was and remains essential for us to be able to sell those businesses and assets that we determine are sapping the company of its remaining strength and cannot contribute to a profitable future. One specialized bankruptcy court in one forum with power to treat all aspects of our problem has enabled us to move with the speed demanded by economic circumstances.

A specialized bankruptcy court in one forum with the power to treat all aspects of a reorganization in an expeditious manner is essential to the reorganization process. That process requires some action in the legal arena to confirm virtually every action undertaken in the business arena. At this moment, the matters before our bankruptcy court include scores of separate actions concerning the disposition of leases, ten actions concerning the future disposition of more than 200 of our operating units, and litigation that will determine the manner in which claims for hundreds of millions of dollars will be treated. Our reorganization demands the continued existence of a system that provides us with prompt and certain court answers to these and other questions.

Without positive action by the 24th of December, bankruptcy procedures will be placed in a state of confusion even worse than the conditions giving rise to reform in the first place. Yet Wickes will be faced with that prospect if Congress fails to act by December 24. Frankly, it is hard for me to imagine that, considering both the quantitative and qualitative burdens on Federal district court calendars, these general jurisdiction courts either could or should be able to render the rapid responses required in the large number of bankruptcy cases now pending.

Wickes is not alone. Many other American companies are striving to continue in business in chapter 11 reorganizations. If all of us are left to a future filled only with judicial confusion and chaos, I foresee that the opportunity for us to rehabilitate our businesses, salvage private sector jobs for the workforce, and return to profitability will be seriously impaired.

I regret having to close on that somber note, but I believe your own straight-from-the-shoulder comments to the American people suggest that you would not want a sugarcoated statement from me.

I do assure you, Mr. President, that to whatever extent my energies can be applied to assist your administration in securing passage of remedial bankruptcy court legislation, I am available.

Sincerely,

Sanford C Sigoloff

Sanford C. Sigoloff

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

No. 81-150

NORTHERN PIPELINE CONSTRUCTION CO., APPELLANT

v.

MARATHON PIPE LINE CO., ET AL.

No. 81-546

UNITED STATES OF AMERICA, APPELLANT

v.

MARATHON PIPE LINE CO., ET AL.

ON APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

MOTION TO EXTEND STAY OF JUDGMENT

The Solicitor General, on behalf of the United States, respectfully moves that the Court extend the stay of its judgment in this case to and including December 24, 1982. The United States submits that this further stay is necessary to allow Congress additional time in which to enact remedial legislation and to avoid the uncertainty, possible economic loss, and waste of judicial resources that would result from a lapse in bankruptcy court jurisdiction.

In its decision of June 28, 1982, the Court invalidated the broad grant of jurisdiction given to the bankruptcy courts by Section 241(a) of the Bankruptcy Act of 1978 (the "Act"), 28 U.S.C. (Supp. IV) 1471, on the ground that the assignment to bankruptcy judges of power to adjudicate plenary disputes involving constitutionally-recognized or state-created rights violates Article III of the Constitution. The Court announced, however, that its decision would apply only prospectively, and it stayed its judgment until October 4, 1982, in order to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication without impairing the interim administration of the bankruptcy laws." Slip op. 38.

Since the Court's decision, a number of bills have been introduced in Congress that would either reconstitute the bankruptcy courts as Article III courts or redefine the bankruptcy courts' jurisdiction to eliminate their jurisdiction to adjudicate claims such as those raised in this case. On August 19, 1982, the House Judiciary Committee reported out a bill, H.R. 6978, sponsored by its chairman, Representative Rodino, that would afford bankruptcy judges the salary and tenure protections of Article III and would preserve the broad jurisdiction originally conferred upon the bankruptcy courts by the Act. See §§ 153 and 154 of § 2(a) and § 1471 of § 33 of H.R. 6978. 1/

The substantial progress of remedial legislation in the House of Representatives indicates that Congress is likely to enact remedial legislation that would cure the constitutional defects in the bankruptcy courts' jurisdiction that the Court identified in its opinion. However, it now appears unlikely that any remedial legislation will be enacted prior to the expiration of the Court's original stay. 2/ There is strong reason to

---

1/ On September 17, 1982, Representative Kastenmeier introduced a bill, H.R. 7132, drafted by the Judicial Conference of the United States, that would continue the bankruptcy courts as non-Article III courts, but provide for removal of certain bankruptcy matters to the district courts. See § 1471(a) and (c) of subsection (a) of H.R. 7132. However, no hearings or committee actions on H.R. 7132 have been scheduled.

2/ The House has not yet taken floor action on H.R. 6978. On September 28, 1982, Speaker of the House O'Neill informed the Attorney General that Congress probably would not be able to enact comprehensive remedial legislation in the closing days before its election recess and asked that the Department of Justice seek an extension of the Court's stay of judgment.

expect that the legislation, or some alternative, will be passed by both Houses and will take effect within the period of the additional stay period requested, which would run until the adjournment of the present Congress.

An extension of the Court's stay is preferable to other possible interim measures. On September 27, 1982, the Administrative Office of the United States Courts promulgated a proposed district court local rule to govern the operation of the bankruptcy courts after October 4. The proposed rule assigns to the bankruptcy courts in each district the district court's jurisdiction over "[a]ll cases under Title 11 and all civil proceedings arising in or related to cases under Title 11." Proposed Rule (b)(1). District courts are authorized to withdraw any reference to a bankruptcy judge, in whole or part, upon the court's own motion or the motion of a party. Id., (b)(2). In addition, the district courts must review de novo any proposed judgment of a bankruptcy court in any proceeding "related to" but not "arising under" a case under Title 11 and in any other proceeding where such de novo review is constitutionally required. Id., (c)(3), (c)(5)(A)(iii), (c)(5)(B). However, the proposed rule does not define those other cases in which district court de novo review is constitutionally required.

Although the Judicial Conference's proposed local rule may enable the bankruptcy court system to function to some degree until remedial legislation is enacted, the proposed rule is a poor alternative to a simple extension of the Court's stay. As an initial matter, it is uncertain whether the proposed rule would withstand a judicial challenge. The proposed rule is based on the assumption that the Court's decision has left untouched the broad bankruptcy jurisdiction conferred upon the district courts by Section 241(a) of the Act, 28 U.S.C. (Supp. IV) 1471(a) and (b). 3/ In fact, it is unclear whether the Court's holding may be limited in that fashion. See slip op. 37 n.40 (plurality opinion); id. at 4 (Rehnquist, J., concurring). Furthermore, there are serious questions whether the proposed rule legitimately may assign to the bankruptcy courts significant portions of the district courts' broad bankruptcy jurisdiction under the Act, since this is precisely what the Court refused to do in holding that the bankruptcy courts' jurisdiction over constitutionally-recognized or state-created rights could not be severed from the remainder of the bankruptcy courts' jurisdiction under the Act. Ibid.

These uncertainties about the validity of the proposed local rule cast doubt upon the rule's effectiveness as an interim remedy. If district courts recognize the problems with the rule and withdraw the reference of many bankruptcy matters from the bankruptcy courts, they will severely hinder the operation of the bankruptcy system because of their own large workloads. On the other hand, if the district courts permit the bankruptcy courts to adjudicate a broad range of cases and proceedings pursuant to the local rule, there is a substantial risk that these cases and proceedings will have to be relitigated if the local rule is found invalid. Under either alternative, the bankruptcy court

---

3/ The memorandum to all court of appeals, district court, and bankruptcy court judges that accompanies the proposed rule states that:

> In Marathon, the Court found that certain powers assigned to bankruptcy judges by the 1978 Bankruptcy Act could be constitutionally exercised only by an Article III judge. The Court refused to sever the constitutional excess and thus struck the Act's assignment of powers to the bankruptcy judges in its entirety, effective October 5, 1982.
>
> Marathon does not cause a jurisdictional lapse. The Administrative Office concludes that Marathon did not invalidate 11 [sic] U.S.C. sections 1471 (a), (b). In addition, sections 404 and 405 of the 1978 Act also vest bankruptcy powers in the district courts as "courts of bankruptcy" until 1984.

system will operate under a cloud. The magnitude of this problem and the potential waste of judicial resources is indicated by the fact that over 700,000 bankruptcy estates -- and 100,000 adversary proceedings -- currently are pending and new bankruptcy petitions are filed at the rate of more than 10,000 per week. Administrative Office of the United States Courts, 1982 Annual Report of the Director 8, 10 (preliminary ed., Sept. 22, 1982).

This confusion and waste of judicial resources would occur even if the proposed local rule were found invalid immediately. Absent remedial legislation, bankruptcy cases would be remitted to the district courts' equity jurisdiction, with its traditional distinctions between summary and plenary jurisdiction. 4/ However, the district courts' traditional bankruptcy jurisdiction is narrower than either the jurisdiction the bankruptcy courts exercised under the 1978 Act or the jurisdiction the bankruptcy courts are likely to have under the proposed remedial legislation. See § 1471 of § 33 of H.R. 6978; § 1471 of H.R. 7132. Were the district and bankruptcy courts to exercise a more limited bankruptcy jurisdiction in the interim between October 4 and the effective date of remedial legislation, many of the claims routed to state courts or brought as separate actions in other district courts would have to be reinstituted or transferred when the reconstituted bankruptcy courts once again assumed their broad jurisdiction.

This Court previously has extended a stay of its judgment in analogous circumstances. In Buckley v. Valeo, 424 U.S. 936

4/ Various arguments have been presented in favor of the conclusion that bankruptcy jurisdiction will return to the district courts on October 4. See House Report, supra, 30-49. The clearest case, however, is made by 28 U.S.C. 1334, which provides that "[t]he district courts shall have original jurisdiction * * * of all matters and proceedings in bankruptcy." Section 1334 was amended by Section 238(a) of the Act, 92 Stat. 2668, to limit district courts to appellate bankruptcy jurisdiction. However, these amendments to Section 1334 do not take effect until April 1, 1984. See § 402(b) of the Act, 92 Stat. 2682.

(1976), the Court extended its stay in order to permit Congress to complete work on legislation to remedy constitutional deficiencies in the manner of appointment of members of the Federal Election Commission. The extended stay permitted the Commission to continue performing its duties in the interim until its members properly could be appointed as Executive officers. Here, too, a short additional stay is warranted in light of the magnitude of the policy choice facing Congress, at a time when legislators are preoccupied with a host of pressing national problems, and the degree of disturbance that would occur if the Nation's bankruptcy system were placed in constitutional limbo while Congress pondered the most appropriate legislative course. 5/

The United States believes that the progress of remedial legislation in Congress and the great public interest in continuing uninterrupted the broad jurisdiction of the bankruptcy courts calls for an extension of the Court's stay for the period requested.

Respectfully submitted.

REX E. LEE
Solicitor General

OCTOBER 1982

5/ The Court observed in Marathon that the Bankruptcy Act of 1978 was the product of "almost ten years of study and investigation" (slip op. 1), much of which was devoted to the difficult policy question Congress has now been required to revisit.

Senator **Dole**. Our final witnesses are Judge Richard L. Merrick and Judge Joe Lee.

STATEMENTS OF RICHARD L. MERRICK, PRESIDENT, NATIONAL CONFERENCE OF BANKRUPTCY JUDGES, AND JOE LEE, CHAIRMAN, COMMITTEE ON LEGISLATION, NATIONAL CONFERENCE OF BANKRUPTCY JUDGES

Judge **Merrick**. Senator Dole, my name is Richard Merrick. I am a bankruptcy judge for the Northern District of Illinois. On Monday, I submitted a prepared statement to the clerk and I would like to have that included as a part of my statement today.

Senator **Dole**. It will be included, Judge Merrick.

Judge **Merrick**. Also, with respect to the clerk's office, the National Conference of Bankruptcy Clerks is preparing a statement with statistics and I would like to submit that later as a part of my testimony.

Senator **Dole**. That will be submitted later, along with some other statements, I understand, that the Justice Department may have that will be submitted later.

Judge **Merrick**. Last night as I was walking through the airport, I saw in the headlines of one of the papers that Congress was considering establishing 200,000 public works jobs. It is my estimate that if broad jurisdiction with article III courts is not enacted before the end of the year, by next spring you will have 200,000 present employees of chapter 11 corporations who are out of jobs or employees of corporations that have not yet filed, and the reason for that is that corporations will not be able to get financing to carry on unless the lenders are assured that they will have a chance of recovering the money which they lend.

Essentially, I do not disagree with the statement of Mr. Rose. I have some different points of emphasis. With respect to the nature of the court, I think a better court would be a separate bankruptcy court rather than a court that is a bankruptcy division of the district court. But if the bankruptcy division had a separate, independent clerk's office, I think that that would be a workable solution, although not as good as a separate court.

Now, the one caveat that I would have there is that the bankruptcy court is going to have a lower salary range than the district court. It may very well be that you would not get as highly qualified applicants.

Senator **Dole**. That is something I think we must address. I do not see any reason for the distinction.

Judge **Merrick**. Now, with respect to the question of whether the rule suggested by the Administrative Office will work, it is my own feeling that it is unworkable for various reasons. It is improperly conceived. It was improperly presented. The sponsor of it misquoted his two principal sources of reference—section 105 of the code and rule 927.

But beyond that, it is the very general feeling of lawyers that it is unworkable. And if the lawyers feel it is unworkable and it is not constitutional, they will not issue opinions that will cause the lenders to proceed.

I think that covers the principal part of what I was going to say orally. If there are any questions that you have, I would be glad to answer them.

Senator **Dole**. All right. Let us hear from Judge Lee, and then if I have a minute or two, maybe we can—I have some questions which I will want to submit in writing, Judge Merrick.

Judge **Merrick**. Very good.

Senator **Dole**. I may have an oral question or two, as well.

Judge **Lee**. Senator, I am Judge Lee from Lexington, Ky. I have submitted a written statement, and with my statement I am submitting a legislative proposal which is an alternative to the proposal submitted by the Justice Department.

If the bankruptcy court is to be a division of the district court, we are proposing that it at least be a separate division of record with its own clerk, as it is now, because there is too much volume of work in that court that is different from the work of the district court that should not be lodged in the clerk's office in the district court.

We experimented with consolidation in the early seventies and it simply did not work, and the predecessor to this committee, the Committee on Judicial Improvements, enacted a bill which prohibited that consolidation because there was substantial evidence that it simply did not work.

We are taking the position that possibly bankruptcy judges should not be fungible at this time because there is simply too much work in the bankruptcy court, probably for the next 5 years, for them to be available to sit on other matters in any event, even if they were fungible.

We also alert the committee to the fact that we believe there should be representation of the bankruptcy court on the Judicial Conference and the Judicial Councils of the circuit. The Justice Department's bill does not make any provision for such separate representation.

Thank you.

Senator **Dole**. Well, I wanted to ask, just so the record would be clear, Judge Merrick, as I understand it you are just speaking for yourself this morning and not for the Conference?

Judge **Merrick**. That is correct.

Senator **Dole**. Judge Lee, are you speaking for the Conference?

Judge **Lee**. Yes, sir. I am chairman of the Legislative Committee.

Senator **Dole**. Right, but I want the record to indicate that that is the case. Also, I guess the record should indicate that there have been a couple of other legislative proposals submitted or suggested. The one that you are suggesting today would be the one that you would like to focus on now. Is that correct?

Judge **Lee**. Yes.

Judge **Merrick**. If I may say one thing, I think H.R. 7152 would be absolutely unworkable.

Senator **Dole**. That is the Butler bill?

Judge **Merrick**. No. That is introduced by Mr. Kastenmeier.

Senator **Dole**. You say that is unworkable?

Judge **Merrick**. Yes.

Judge **Lee**. It is patterned after the rule which the Justice Department says is unworkable, and we agree with that.

Senator **Dole**. You do not have any comments on the earlier testimony today? Are you going to be able to handle all those cases?

Judge **Merrick**. I have some experience with UNR, which was the first of these companies in the asbestos business to file. They were rather shaky financially. I happened to be the emergency judge on the day that they filed.

One of the basic principles of bankruptcy law is that all creditors shall be treated equally. Now, all of the testimony today was devoted to tort claimants. No consideration was given to trade creditors. If a company devotes all of its assets to its tort claimants, it is not going to have anything for the trade creditors. It is not going to get any credit, and the costs of its supplies are going to go up.

I think that is a fairly evident matter of economics, but it just was not mentioned earlier.

Senator **Dole**. I think that is certainly a consideration that I am aware of. It probably would not be fair to ask you to comment on whether you think this is a fair use of chapter 11, so I will not ask that.

It has been suggested by a couple of witnesses that perhaps we have some superfund concept in connection with the bankruptcy proceedings and independent of bankruptcy proceedings.

I will just say this without asking a question, because I do not think it is fair to ask judges questions that might be before them at a later time. You know, we are trying to find a resolution of this very serious problem without, frankly, overloading the bankruptcy courts. And there are a lot of questions involved and we have got a lot of different interests to reconcile.

And it would be very helpful to us if, in either some off-the-record way or some direct way, we could have the views of the Bankruptcy Conference.

Judge **Merrick**. I would be glad to make suggestions. One of the problems that a superfund poses is that as the bankruptcy law is set up, each estate is separate. There is not any provision for contributing to some other fund or having outside resources come in.

So I would guess in any event that new legislation would be necessary in order to do that, but I would be glad to work with you on that.

Senator **Dole**. Well, I think beyond the superfund concept, just the whole problem and how it is going to impact on your court, how it is going to impact on plaintiffs and defendants and the Government—we have got a big problem we do not seem to be able to get a handle on that involves a lot of people, not to mention, obviously, the claimants involved and the victims involved.

So we may be looking to you for some guidance, both Judge Merrick and Judge Lee.

Judge **Merrick**. We would be glad to do it.

Senator **Dole**. Well, thank you very much, and I hope that we will address the problem that you discussed today specifically prior to December 24. I am not certain the Supreme Court is going to continue granting stays just because that is how Congress operates.

We do everything from month to month and there is nothing that we cannot put off for at least 30 days, and generally do, which may be a blessing in some cases. But I would doubt that the Court is as easy as we are.

Judge **Merrick**. I think it is pretty generally felt—and I do not know what the basis of it is—that the Supreme Court will not grant an additional stay.

Senator **Dole**. I will send that observation out to my colleagues. Thank you very much.

[The prepared statements and additional submissions of Judges Merrick and Lee follow:]

STATEMENT OF RICHARD L. MERRICK

Senator Dole, members and staff of the Committee on Courts, it is a privilege for me to appear before you today, and I appreciate an opportunity to present my views on H.R. 7294. I shall follow the suggestion of your invitation and direct my attention primarily to the bankruptcy court structure contained in the bill.

By way of identification, my name is Richard L. Merrick. I am now, and have been for 8-1/2 years, a bankruptcy judge in the Northern District of Illinois, Eastern Division, which encompasses metropolitan Chicago extending northward to Wisconsin, westward nearly to Rockford, and southward to Streator, containing in all about 3/4 of the population of Illinois. Presently I have 7,000 bankruptcy cases assigned to me. Including these, I have been responsible for about 19,800 cases, of which 10,100 have been Chapter 7 (Ch. I-VII), 300 Chapter 11 (Ch. XI), and 9,350 Chapter 13 (Ch. XIII). Last week, which was fairly typical, I handled 481 motions and hearings, an average of 96 per day.

Currently I am president of the National Conference of Bankruptcy Judges. What I have to say today represents my own views and not those of the Conference. In fact the Conference has taken an official position on only two aspects of legislation, both of which are reflected in resolutions attached to this statement, which may be summarized:

1. An Article III Court to administer bankruptcy cases is essential because "the Rule" proposed by the Judicial Conference and the bill (H.R. 7132) proposed by the Administrative Office will not work.
2. There should not be a "threshold test" to determine eligibility for a bankruptcy discharge.

Although not represented by official resolution, there is a virtually unanimous feeling among the members of the Conference that there should be an adequate retirement program for those bankruptcy judges who are not appointed to the newly created court in spite of a willingness to serve.

Although not generous, I feel that the retirement program contained in H.R. 6978 is fair and gives recognition to the fact that, contrary to most civil service employees, bankruptcy judges join the federal work force at an age considerably older than the average; they bring skills and experience to the bench based upon years of work in which they were not covered by a government retirement program. Thus a pension based only upon years of judicial service would be unduly harsh under circumstances where termination was not voluntary but was forced upon them by a changedlaw which they had had no way of anticipating at the time that they accepted the position of bankruptcy judge. In industry under such circumstances it is customary to provide some form of severance pay, and it is appropriate that such should be done here.

The three bills which I have compared, H.R. 6978, H.R. 7294, and the typed draft of Senator Dole's proposed bill, deal with the problem in a very similar manner, and for the most part are identical in form in providing relief to a bankruptcy judge who has attained sixty, has been a judge for ten years or more, and has waived any rights which he might have had otherwise to a civil service or military pension. A person who becomes physically disabled and retires for that reason shall receive full salary if he had worked as a judge for ten years and one-half of salary if he had worked as a judge less than ten years. There are some differences in the salary base upon which the pensions are calculated, which I shall discuss after consideration of the common elements.

I suggest that the requirement of ten years of service to be eligible for an augmented pension in lieu of severance pay is founded upon a misunderstanding of the common basis for ten year vesting of pension rights in private pensions. That is a line which was drawn for reasons of economy but is founded on the principle that persons who have stayed with a company for ten years may be considered as being permanent members of the corporate entity. In the situation under consideration the reason that some of the bankruptcy judges will not achieve ten years of service has nothing to do with their wishes. It is a result of change of law and the elimination of the job of Article I judge.

What is particularly illogical is to penalize a person who has become physically disabled. There is no rational reason why a judge who has suffered a stroke after ten years of judicial service should receive a pension twice as large as that of another judge who had his stroke after nine years of judicial service.

For purposes of comparability of the competing bills it will be assumed that persons compelled to retire do so at the present date, which eliminates many assumptions and permutations. Thus final salary is $58,500, and a three average salary is $53,256. H.R. 6978 calls for a pension based upon final salary; H.R. 7294 and the Dole draft call for a pension based upon a three-year average. Either of those concepts is supportable by reference to industry, but it should be noted that the basis for a three-year average in industry is to avoid excessive bonuses or overtime payments in the final year, which are not applicable in bankruptcy courts. H.R. 6978 does not have a maximum pension; H.R. 7294 and the Dole draft have a maximum pension of 80% of salary on September 30, 1983, a higher base than that used in calculating the pension. An 80% ceiling is common in industry and is not objectionable philosophically. Judges with less than ten years of service who do not leave because of reasons of physical incapacity will receive a civil service pension, a maximum annual amount of $8,472.50 for nine years of service as a judge and no other federal service.

The annual pensions payable to judges not reappointed and percentage of current salary are:

Judicial Service	Present Law	H.R. 6978	H.R. 7294
5 years	$ 4,387 (7.5%)	$ 4,387 (7.5%)	$ 4,387 (7.5%)
10 "	9,506 (16.25%)	27,160 (46.4%)	13,314 (22.9%)
15 "	15,306 (26%)	37,606 (64.3%)	19,971 (34%)
20 "	21,106 (36%)	48,052 (79.9%)	26,628 (45.5%)

It should be apparent what the disparity is for judges who have served as judges less than 10 years. There is no logical basis for this penalty where the severance was not of their own choosing. I feel that for any bankruptcy judge who took office before November 6, 1978, the enactment date of the Bankruptcy Code, the retirement pay should be not less than 50% of salary at the time of forced retirement ($29,221). Any judge who took office after November 6, 1978 knew that he would not be able to count on continuing reappointments until he achieved age 70. Thus he had an ability to determine his own fate at the time that he accepted appointment. Overall the structure of H.R. 6978 appears equitable except that the requirement of ten years of judicial service should be reduced to four years and there should be a floor of 50% of final salary for those judges who took office before November 6, 1982.

IMMEDIATE URGENCY

It is almost universally believed that the Supreme Court will not grant a further extension to the stay of execution of the decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., _____ U.S. _____ 50 U.S.L.W. 4892 (Nos. 81-150 and 81-546, June 28, 1982) which expires December 24, 1982, because the current stay was issued October 4, 1982, largely upon the representation of the leadership of the Congress that a legislative solution of the problem was imminent. It is my belief that in the next month the Senate Committee on the Judiciary will have as great an impact upon the economy of the United States as will the Federal Reserve Board.

Generally, lawyers who represent banks state that unless a broad jurisdiction bankruptcy court with Article III judges is established by legislation before December 24, 1982 (unless the Supreme Court stay should be extended which they doubt), they will not issue opinions that court orders will be enforceable which approve loan transactions after that date. Unless the banks feel that they will be protected with respect to the new cash and credit which they are offering to a chapter 11 corporation, they will not offer it. Without cash or credit the corporations will not be able to continue and will close, thereby causing all of their employees to lose their jobs. The ripple effect upon the suppliers of the closed debtor corporations will cause many of them to fail also. The contraction in purchasing power may spread throughout the communities in which either debtor corporations or suppliers to them are situated. Our present weak economy, which is just barely beginning to turn around, will not be able to withstand the shock of suddenly reduced employment by debtor corporations and their suppliers. Furthermore, with unemployment already near an all time high, it is too serious a risk to take. Bankruptcy courts' clear jurisdiction must be established before December 24, 1982.

H.R. 7294

H.R. 7294 consists of 15 separate measures. It is essential to the economy and the entire bankruptcy process that one of them be enacted before December 24. Whether the remainder are enacted in 1982 or 1983 is not critical, but it is like playing Russian roulette with the economy to cause passage of the jurisdiction bill to be in any way dependent upon favorable action on any of the other 14 measures. Many of them are sweeping and will create opposition because of their substantive nature. Four of them establish new bureaucracies at the time of the greatest deficit which the country has ever had.

Each of these non-emergency measures causes grave risk to the emergency measure in that opposition to the one will obstruct action on the other. Having no experience with the legislative process, I am tremendously fearful that some legislator will believe that he has sufficient leverage power so that his measure will have to be carried along in order to obtain passage of the one bill that is needed so desperately by the whole country. After discussing the emergency measure, I shall comment briefly on several of the non-emergency measures.

H.R. 7294

Title II Judicial Powers Amendments

Subtitle A - Bankruptcy Court Act

Short Title - Bankruptcy Division Act of 1982

H.R. 7294 accomplishes what needs to be done by establishing a broad jurisdiction court administered by Article III judges. Thus there can no longer exist any questions of constitutionality respecting jurisdiction or scope of jurisdiction. The court will have the power to deal expeditiously with any problems which come before it. This is the primary and essential need at the moment; everything else is secondary.

H.R. 6978 provides for broad jurisdiction under Article III judges. Thus it gets the job done also. The nation may feel comfortable in its economic thinking under either law.

H.R. 6978 provides for a new and separate bankruptcy court consisting of newly appointed tenured Article III judges. The salary established is $65,000, 92.4% of the $70,300 salary of district court judges. Express provision is made for a bankruptcy court clerk's office.

The format of H.R. 7294 is different in that a newly created Bankruptcy Divison is established within the district court. Because the newly appointed judges will be district court judges there will be no differential in salaries between those with general responsibility and those designated to sit in the Bankruptcy Division Sections. Chapter 50 of the Judicial Code

(28 USC §§771-775), which provides for a separate bankruptcy court clerk's office is not repealed, which may or may not have been considered.

JURISDICTION AND VENUE

The jurisdiction and venue sections of the existing statute (28 USC §§1471-1482) are virtually identical with comparable sections of H.R. 6978 and H.R. 7294 except where structural differences between the courts require technical changes. §§1471-1475 are not changed. §1476, needed to conform bankruptcy court districts to district court districts, is not needed where the bankruptcy function is exercised by a district court, and so it is omitted from H.R. 7294, causing the subsequent numbering of that bill's section numbers no longer to coincide with those of the existing statute and H.R. 6978. §1477 is the same in both bills and the statute. §1478(a) of the statute is changed by both bills, which cause "Government unit" to read "governmental unit." §1478(b) of the statute is amended in both bills by deleting "or a decision not so remanding", with the consequence that a decision by the bankruptcy court, or bankruptcy division as the case might be, to remand a transferred case would not be reviewable, but a decision to retain a transferred case would be reviewable. I agree that the trial court should not be second guessed if it determines that a transferred case should be returned to the initiating court. I agree that the decision to retain a case should be reviewable. §§1479-1480, and 1482 are copied by both bills. §1481 is unnecessary in H.R. 7294 and has been modified by H.R. 6978 to reflect that the bankruptcy court has become a full Article III Court.

BANKRUPTCY APPELLATE PANELS

H.R. 6978 and H.R. 7294 differ from each other and from the existing statute with respect to appellate panels. Under existing law appellate panels of bankruptcy judges are optional with the respective Circuit Councils and have been adopted only in the First and Ninth Circuits. H.R. 7294 continues to permit the creation of an appellate panel to be optional, but H.R. 6978 makes it compulsory. H.R. 7294 follows the existing statute in providing that the panel "shall sit at a place convenient to the parties to the appeal." H.R. 6978 does not specify where the panel shall sit.

My own preference would be to have bankruptcy appellate panels mandatory in order that appeals would be heard by persons familiar with bankruptcy law. It is my feeling that the appellate panels should move around the circuit and I believe that the existing law (28 USC §160(c)) and the proposal of H.R. 7294 (§206(a)) adding §145(c) are adequate for this purpose. Every bankruptcy judge whom I have heard discourse on the subject over the last years has stated that bankruptcy courts function infinitely better if they have their own independent and separate clerk's offices than if they are consolidated with or dependent upon district court clerk's offices. If the assumption stated above is correct that §§771-775 of the Judicial Code shall remain in force, I believe that there is little to choose between H.R. 6978 and H.R. 7294 with respect to court structure. The 7.2% difference in salary levels between the two court structures is not significant. For psychological reasons of prestige or vanity, however, it might be that prominent lawyers, who will be taking an income reduction to go on the bench in any event, will not wish to go to a bankruptcy court which is labelled publicly as being inferior to a district court because its judges are paid less. The one factor which makes H.R. 6978 vastly superior to H.R. 7294 is that the former is limited to one subject about which there is little or no controversy respecting bankruptcy issues. Thus there is nothing inherent in the bill which should deter its passage. Any objections to the passage of H.R. 6978 are unrelated to the subject of the bill.

H.R. 7294 - EXTRANEOUS SUBJECTS

"TO ... establish bankruptcy courts under Article III of the Constitution" is the fourth of the stated purposes of H.R 7294 and was discussed above. Because of the economic times and jurisprudential uncertainty respecting bankruptcy courts, it is my view that the bankruptcy court aspect of the bill is all that is germane to the crisis atmosphere in which we exist.

(a) Title I Court Reform

I have no especial knowledge about federal court reform which would be helpful to the Committee, but I am aware that Part 3 respecting Civil Priorities and Subtitle B respecting Diversity Jurisdiction will create considerable dissension. None of these is an emergency matter, and all of them are of such broad implications that they deserve ample hearings in a full session of Congress. Opposition to them easily might endanger passage of the bankruptcy jurisdiction bill.

(b) Subtitle C - Judicial Survivors Annuities and Subtitle B - Omnibus Judgeships probably do not have major objecting groups if appropriations can be obtained to implement them. There is no reason for them to be considered along with bankruptcy reform unless their sponsors do not believe the bills have sufficient support so that they can stand on their own feet. If they can not, it must be for some reason, fiscal or otherwise, which could jeopardize passage of bankruptcy reform.

(c) Subtitle D, State Justice Institute; Subtitle E, Federal Courts Study Commission; Subtitle F, Intercircuit Tribunal, and Subtitle G, United States Trustee Program, establish four new bureaucracies which may or may not have a sufficient purpose to justify their expense. Whether they are necessary for the future is a matter for debate, but certainly they are not necessary for 1982. They will present barriers to something which is essential.

I am familiar with the United States Trustee program as it has existed in the past and generally approve of it. A large number of lawyers and bankruptcy judges find fault with the system, which suggests that a broad study should be conducted before an expanded program is adopted. This could not be accomplished during a special session of the Congress, so that this feature should be removed before an actual bill is proposed for legislative action.

(d) Title III -Bankruptcy Improvements

Subtitle B - Grain Elevator Bankruptcy Amendment

Subtitle C - Leasehold Management

Subtitle D - Referees Salary and Expense Fund Act

It is my belief that S.1365 and S.2297 were passed by the Senate in the regular session, so that it should not be necessary to duplicate them by having them included in the bill to be proposed. The Salary and Expense Fund proposal is considered by many to be in the nature of special legislation and will create opposition on that ethical principle. In any event, the Spring of 1983 is time enough to deal with them.

(e) Subtitle A - Consumer Credit

From handling about 19,000 consumer bankruptcy cases I am familiar with many of the problems which arise, and I should be pleased to return next Spring to present my views on solving some of these problems. There are five consumer finance companies which appear before me on a regular basis. Two of them seem to conduct themselves properly, both within and without the court. One of them is marginal in both. The conduct of the other two is outrageous. They continuously flaunt the law and all standards of acceptable normal conduct. I feel strongly that they should not be given any additional enforcement tools until they learn to utilize in a civilized manner the tools which they have. Combining consumer finance measures with court jurisdiction in a single bill is forcing Congressmen to make a difficult decision, a cruel decision, and an unnecessary decision. I believe that consumer finance should not be a part of the jurisdiction bill but should be taken up separately in a manner that will provide adequate safeguards to debtors.

Thank you for permitting me to share my views with you.

ANSWERS TO QUESTIONS FROM THE SUBCOMMITTEE ON COURTS

1. Q. Judge Merrick you are the newly elected President of the National Conference of Bankruptcy Judges. Apparently, the views you express, however, are your own. Is it possible that the conference will take a formal position on these bills and proposed amendments prior to November 29th when the Congress reconvenes for the lame-duck session?

A. It is not possible for the Conference to take additional formal positions on proposed legislation before November 29 because there will not be a meeting. The results of an informal telephone poll of the Board of Governors (21 out of 21) are included in each answer.

2. Q. If the bankruptcy judges are granted full Article III district court judgeship status, as is envisioned by the Butler bill, should they be assigned non-bankruptcy matters if their bankruptcy caseload permits? Should other district court judges be assigned bankruptcy matters if their caseload permits?

A. It is difficult to prove the validity of a belief of bankruptcy judges and bankruptcy practitioners that district court judges assign a low priority to bankruptcy matters. At the very least there does not seem to be an awareness on the part of the district court judges that their decisions will affect ongoing businesses and that a delay in a decision frequently is as damaging as an adverse decision.

During the four-plus year period, October 1, 1978 to October 31, 1982, 254 appeals have been taken from the bankruptcy court of the Northern District of Illinois, Eastern Division, to the district court of that district; 212 have been disposed of in an average time of 5.63 months; 42 have not been disposed of after an average time of 7.53 months.

Eleven of the district court judges have had appeals which have taken longer than one year to decide or which are still pending after one year.

Comparable figures covering the time spent with respect to civil cases before the district court, both average and maximum, are not available, but it is the general feeling that the period is considerably shorter particularly if major anti-trust and civil rights cases are excluded. This leads to the belief that if bankruptcy were to become a function of a Bankruptcy Division of the district court, the attitude of the whole court would control the Bankruptcy Division. This could be particularly disruptive under a system of fungibility. For the most part civil cases in the district court relate to monetary liability for past torts or past breaches of contract. There is little or no immediacy about the conclusion of those proceedings, but nevertheless they are given priority over bankruptcy appeals by district court judges, even though delay frequently is fatal in bankruptcy cases. It appears probable that bankruptcy would suffer under a Bankruptcy Division unless the enabling statute should require that bankruptcy matters shall have a priority over other civil cases.

Judge	Disposition	Time Elapsed (Months)
A	decided	30.25
A	decided	20
A	pending	15
A	decided	13.50
A	decided	13.25
A	pending	12
B	decided	20.75
B	decided	17.50
B	decided	16.50
B	pending	15
B	decided	14
B	decided	12.50
C	decided	17
C	decided	15.50
C	decided	13.50
D	decided	14
D	pending	12
D	pending	12
E	decided	26
E	decided	12.50
F	decided	15
F	decided	12.50
G	pending	24.75
H	pending	20.25
I	decided	20
J	decided	19
K	decided	12.50

The foregoing is based upon the assumption that the Bankruptcy Division will operate with an independent bankruptcy clerk's office. I do not believe that anybody familiar with the past operation of consolidated offices (bankruptcy cases combined with district court cases) considers that a consolidated office is feasible if bankruptcy cases are to be administered efficiently. Two of the Governors feel that the benefits to be gained through interchanges between judges at the same hierarchical level more than offsets the operational disadvantage of a consolidated clerk's office. One of the Governors favors the Bankruptcy Division approach if there is an independent clerk's office, but not otherwise. Six of the Governors are neutral if the Bankruptcy Division has an independent clerk's office. Six additional Governors are neutral provided that there is an independent clerk's office and also a statutory provision that bankruptcy cases take priority over all other civil cases. Six of the Governors are opposed to a Bankruptcy Division under any circumstances. Of those who favor a Bankruptcy Division or are neutral provided that safeguards are established, there is about an even split on the question of fungibility.

On the pure issue of Rodino bill vs. Butler bill it is Rodino 19, Butler 2.

3. Q. What is the status of the "interim" rules as promulgated by the Judicial Conference in September in the several circuit and district courts? Can they fill the breech if Congress has not acted by the December 24th deadline and the Supreme Court does not grant an additional stay?

A. I gain the impression that all of the circuits have in place some form of "the Rule". The Third Circuit has adopted, and the Fifth Circuit and Ninth Circuit are working on adaptations of "the Rule" which are not as patently invalid as "the Rule" proposed by the Administrative Office because an interested party can seek a de novo hearing more readily. This still causes to remain the dilemma about the validity of an order of an unconstitutional court if a de novo hearing is not requested. Possibly the thinking is that if a party is not sufficiently concerned to seek a rehearing initially, it will not have a sufficient interest to raise the issue later.

Most district courts have adopted the rule of their respective circuits on a conditional basis which will become operative if no legislation is enacted and the stay is not extended. The balance of the districts probably will adopt similar rules under those circumstances. In most districts experienced lawyers feel that serious doubts exist as to the validity of any such half-way measure.

"The Rule" was adopted by the various judicial circuits late in September on the basis of a September 27 letter from the Administrative Office of the United States Courts over the signature of William E. Foley, Director. At that time neither the circuit judges nor the district judges were aware that the two authorities which Mr. Foley gave as providing a juridicial basis for "the Rule" were both mis-quotations.

The first authority cited by Mr. Foley was Rule 927 of the Rules of Bankruptcy Procedure, which he said provides,

> "Each district court ... may from time to time make and amend rules governing practice and procedure..."

In fact it provides,

> "Each district court ... may from time to time make and amend rules governing practice and procedure ... not inconsistent with these rules. (underscoring supplied).

The proposal of "the Rule" that the bankruptcy judges should act as special masters or referees is not consistent with the Rules of Bankruptcy Procedure, which contemplate that bankruptcy judges shall act in a judicial manner and shall issue final orders. Also "the Rule" is not "governing practice and procedure" but is establishing jurisdiction for the bankruptcy court. Most practitioners feel that what the Congress can not do constitutionally by statute, the district courts can not do constitutionally by rule.

The second source of authority relied upon by Mr. Foley, and misquoted, is Section 105 of the Bankruptcy Code. Mr. Foley's letter states:

> "The attached rule [the Rule] is an interim measure by which district courts may delegate many of their bankruptcy powers to bankruptcy judges. The authority for this is found in Section 105 ... which gives courts of bankruptcy the power to issue any order, process or judgment that is neces-

sary or appropriate to carry out the provisions of
this title;" (underscoring supplied).

Contrary to what Mr. Foley suggests, section 105 does not refer to "courts of bankruptcy", [i.e., district courts] but refers to "bankruptcy court," [i.e., bankruptcy court].

Sec. 105 (11 U.S.C. §105):

POWER OF COURT

(a) The bankruptcy court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title."

There is no way by which a bankruptcy court could issue an order which delegated to itself powers of the district court. It is contrary to the basics of jurisprudence for a court to create its own jurisdiction.

Another position frequently taken by bankruptcy specialists is that "the Rule" is invalid because it is inconsistent with two of the Federal Rules of Civil Procedure, Rule 53(e)(2) and Rule 83. Because the Federal Rules have the force of a statute they cannot be controverted by local rules of district courts.

4. Q. The Rodino bill creates a fourth tier of federal judgeships with the bankruptcy judges getting approximately 90% of district court judgeships salaries and the separate bankruptcy court system remaining. The Butler bill creates bankruptcy divisions of the district courts with all judges receiving the same salaries and benefits. Which proposal does your group prefer?

A. This is covered generally in the answer to question 2. Taking the Rodino bill and the Butler bill as they stand at the present time, the vote is Rodino 19; Butler 2.

5. Q. I was wondering if you could give us a brief status report on the Chapter 11 filings of some of the bigger corporations, for instance Wickes, Braniff, and Manville, in light of the shadow Northern Pipeline has cast on the bankruptcy courts jurisdiction? Also, could you project what might happen to these mammoth reorganizations if Congress fails to act with regard to Northern Pipeline by December 24?

A. In most courts matters are proceeding as though Northern Pipeline had not happened, with these exceptions:

1. Objections to subject matter jurisdiction are being denied or continued past December 24;
2. Trials of proceedings which can be completed and entered before December 24 are being held; if both

trial and order can not be completed by December 24, the trial is postponed; and

3. Long range financial commitments are not being made pending legislative action.

It is believed that generally Chapter 11 corporations requiring cash or credit after December 24 will have difficulty obtaining it and that the companies will be required to close because of lack of working capital in the event that definitive legislation is not enacted. The loss of jobs has been estimated at between 200,000 and 300,000.

[See attachment: "Bankruptcy crisis may cause 300,000 lay-offs, judge warns," from the Chicago Daily Law Bulletin.]

6. Q. Would you support legislation reinstating the good faith requirement for business to be able to file under Chapter 11? If Congress did reinstate this requirement, do you believe it would have a significant impact on the number of Chapter 11 filings?

A. My own view is that good faith is a prerequisite to any cause of action, whether divorce, tort, breach of contract or bankruptcy; for each, the petitioner must have an honest belief that he is entitled to relief. Thus, inserting a good faith requirement does not add anything unless the good faith clause has a secondary meaning of some sort. Thus begins an almost endless amount of controversy over what constitutes good faith. Adding the words "good faith" without defining them might lead to the time consuming preliminary hearings associated with Chapter X, which four Governors expressly oppose and one favors. Half of the remainder of the Governors thought that adding "good faith" would do no harm and no good. The other half thought it would be detrimental because of the confusion it will create.

A majority of the Governors felt that if a Congressional policy is intended to be expressed, it should be explicit. For example, the Code might be modified to require that a debtor to file under Chapter 11 must be unable to pay his debts as they mature. A majority of the Governors disapprove of this test because they believe that creditors will fare better overall if the debtor can file somewhere along the downhill slope and not have to wait until he reaches the bottom.

I failed to ask the Governors what impact a good faith requirement might have upon filings, but it is my opinion that it would be slight, not even subject to statistical verification.

Attachment.

[From the Chicago Daily Law Bulletin]

Volume 128, No. 226 Thursday, November 18, 1982

Bankruptcy crisis may cause 300,000 layoffs, judge warns

By a Law Bulletin staff writer

As many as 300,000 workers will probably be laid off if Congress fails to restructure the bankruptcy court system prior to the Dec. 24 deadline set by the U.S. Supreme Court, the president of the National Conference of Bankruptcy Judges has predicted.

Richard L. Merrick, a Chicago bankruptcy judge, warned of "impending chaos" if Congress fails to respond to the high court's latest stay of its June ruling declaring the present bankruptcy system unconstitutional.

A "sudden unemployment surge" will result if the ruling takes effect before Congress acts, because banks and other creditors will no longer provide operating money to firms in reorganization under Chapter 11 of the Bankrupcy Code, Merrick said during a Thursday seminar at the DePaul University Law School.

Though the high court extended its original Oct. 4 deadline until Dec. 24, Merrick said a further stay is not expected.

Last week, testifying in Washington D.C. before the Senate Judiciary Committee's subcommittee on courts, Merrick urged prompt passage of a bankruptcy restructuring bill which would grant lifetime tenure to bankruptcy and preserve the broad jurisdiction of the current system.

Consideration of some "non-emergency" provisions affecting consumer credit and creating some new bureaucracies should be deferred as such provisions could endanger passage of more crucial bills, Merrick said.

Among the pending bills, both H.R. 7294 and H.R. 6978 would accomplish "what needs to be done by establishing a broad jurisdiction [bankruptcy] court administered by Article III [lifetime-tenured] judges," he said.

TESTIMONY OF CLERK BARBARA A. EVERLY, U.S. BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF IOWA, ON BEHALF OF THE NATIONAL CONFERENCE OF BANKRUPTCY CLERKS

I am Barbara A. Everly, Clerk of Bankruptcy Court for the Northern District of Iowa and President of the National Conference of Bankruptcy Clerks, an organization whose membership consists of most of the nation's ninety-two Clerks of Bankruptcy Courts. I was Chief Clerk in our District from 1965, and then made Clerk of Court on October 1, 1979.

The Bankruptcy Reform Act of 1978 established, for the first time, a bankruptcy court that was, for all practical purposes, independent from the U. S. District Courts, and codified an independent and separate administrative arm of the court.

The viewpoint I express is derived primarily from a management perspective, one that the National Conference of Bankruptcy Clerks is uniquely capable of providing comment upon.

Because of the Supreme Court's decision in Marathon a very real possibility exists that the system may be faced with operating in a manner that, given the present unprecedented volume of bankruptcy cases and related litigation, would be nothing short of chaotic. (There are presently over 730,000 bankruptcy estates plus over 103,000 adversary proceedings pending, with an additional 10,000 bankruptcy petitions being filed weekly.)

Unless Congress acts by December 24, 1982, to resolve the jurisdictional issue, the bankruptcy courts would be forced to operate under a cumbersome and possibly invalid rule promulgated by the Judicial Conference. This rule would create delay, increased paperwork and confusion in the bankruptcy court system. The Solicitor General, in the motion filed in the Supreme Court to extend the stay of judgment in the Marathon case stated with reference to the proposed rule:

> "As an initial matter, it is uncertain whether the proposed rule would withstand a judicial challenge.
> . . . .
> These uncertainties about the validity of the proposed local rule cast doubt upon the rule's effectiveness as an interim remedy. . . ."

The numerous administrative and procedural problems the rule would cause, and the uncertainty thereby created in the whole system would have a potentially devastating effect on the property and contract rights of debtors and creditors. It must be remembered that the success of any bankruptcy system depends in large measure on the speed and efficiency by which it is administered. The numerous appeals and resultant delay thereby created, alone, should give cause for serious concern on behalf of parties before the bankruptcy courts, and may have an unfavorable impact on the workload of the District Courts.

The resolution of the problems here presented appears to be to reconstitute the Bankruptcy Courts under Article III, which would serve the purpose of satisfying the constitutional dilemma, and would further enable the bankruptcy courts to exercise the jurisdiction that Congress, by adoption of the Bankruptcy Reform Act of 1978, expressly intended they exercise.

While the National Conference of Bankruptcy Clerks supports the concept of an independent and separate bankruptcy court, the greatest concern on the Conference is the resolution of the jurisdictional and administrative problems that will result if less than full jurisdiction is given to the Judges who decide bankruptcy matters.

Bankruptcy is an extremely specialized area of the law. The system that has evolved has been a recognition of that. With the passage of the Bankruptcy Reform Act, Congress attempted to acknowledge the importance of the specialty by creating an independent court, with its own administrative arm in the office of the clerk of court, directly accountable to the bankruptcy judges.

It is important to note that the administration of the bankruptcy judicial system is a specialized area of court administration that has also evolved over a period of years and must be preserved. Efforts have been made in the past to consolidate the operations of the district and bankruptcy court offices; but Congress, in 1978, passed what is commonly referred to as the "Deconsolidation Bill". (Public Law, 95-383, 92 Stat. 729) The report accompanying that bill expressed the conclusion that consolidation of the clerks' offices generally resulted in a less efficient system than the separate offices. The differences in the responsibilities and duties of the clerks of the district and the bankruptcy court are quite wide. The bankruptcy clerks are responsible for scheduling meetings of creditors and giving notice thereof and for conducting the meetings of creditors, for example.

The consolidation of the offices would interfere with the already burdened district court clerk's offices and would be a disservice to the parties before the bankruptcy court; the bankruptcy system would be jeopardized, and a less efficient system of justice would generally result.

In summary, remedial legislation is absolutely essential prior to December 24, 1982; secondly, we strongly support legislation that would continue an independent, autonomous, bankruptcy court as a single forum to hear all matters that relate to a bankruptcy case. In relation to this, the Conference stresses the absolute need to also continue the separate and autonomous administrative clerk of bankruptcy court office to adequately serve the very specialized needs of the bankruptcy judicial system.

Congress, in 1978, established as a sound public policy that the nation's need for a reliable bankruptcy system could best be served by an independent judiciary with full jurisdiction, and a complimentary administrative structure in support thereof. This policy must not, and need not, be disturbed -- but, instead can and should be reinforced.

TESTIMONY OF JOE LEE, U.S. BANKRUPTCY JUDGE, EASTERN DISTRICT OF KENTUCKY, ON BEHALF OF THE NATIONAL CONFERENCE OF BANKRUPTCY JUDGES

I am Judge Joe Lee, United States Bankruptcy Judge for the Eastern District of Kentucky, appearing with Judge Richard L. Merrick of Chicago on behalf of the National Conference of Bankruptcy Judges. Judge Merrick is president of the Conference, and I am chariman of the Committee on Legislation of the Conference.

With my testimony I am submitting a legislative draft of an alternative proposal whereby the bankruptcy court would be established as a division of the district court. In lieu of the draft proposal of the Department of Justice, we propose that the bankruptcy court be denominated "an autonomous division of record of the district court known as the United States Bankruptcy Court for the district." This language more accurately describes the present status of the court and the manner in which the court has functioned for the past three years since October 1, 1979, the effective date of the Bankruptcy Reform Act. All the witnesses who appeared at House and Senate hearings on legislation to deal with the dilemma created by the decision of the Supreme Court in the Northern Pipeline Construction Company case stated unequivocally that the present system is working extremely well. Consequently, we believe it would be unwise to tinker with a system that is acknowledged to work efficiently.

Of major concern to us is the fact that under the Justice Department proposal bankruptcy judges would be deprived of power to appoint the clerk of the bankruptcy court and to control the degree of support provided by the clerk's office. The bankruptcy judges have exercised the power of appointment of supporting personnel since 1946 (Public Law 464, 79th Cong., c.512, 2d Sess., approved June 28, 1946). In the late 1960ies and early 70ies there were experiments with the concept of merging the support personnel of the bankruptcy court with the office of the district court clerk and placing them under the supervision of the district court clerk. This experiment was not inspired by an interest in saving money or improving bankruptcy administration. The experiment failed in most districts and detracted from the orderly administration of bankruptcy cases. Congress intervened and called a halt to the experiment in 1978 by enactment of S. 3107, 95th Cong., 2d Sess., approved September 22, 1978.

It is not feasible for the clerks of the district court to assume responsibility for the separate and much greater volume of work now handled by the offices of clerks of the bankruptcy court. The responsibilities and duties of the clerk of the bankruptcy court are quite different in many respects from those of the district court clerk. The bankruptcy court clerk is responsible for scheduling meetings of creditors and promptly notifying creditors of the filing of the cases and of the meetings. The clerk, or the designee of the clerk, has responsibility for conducting the meetings of creditors, and the personnel of the clerk's office have been selected with these additional duties in mind. We do not believe the district court clerk can assume responsibility for running the office of the bankruptcy court clerk and also continue to perform the duties of his own office in a satisfactory manner. The functioning of the district court clerk's office and the bankruptcy court clerk's office will be impaired by such a merger, as has been demonstrated by past experience.

Our legislative proposal deletes the so-called fungibility provisions which would permit bankruptcy judges to sit by designation on the district court or the appeals court, other than on appellate panels to hear appeals from the bankruptcy court. In view of the massive number of cases now pending in the bankruptcy court, we believe it will be several years before bankruptcy judges are available to undertake other assignments. Such a provision would not offer any relief to the district courts or the appellate courts in the foreseeable future. At some future date, after hearings and further consideration of the matter, Congress can authorize such use of the services of bankruptcy judges if there is a substantial decline in bankruptcy filings.

The Department of Justice legislative proposal makes no provision for separate representation of bankruptcy judges on the Judicial Conference of the United States and on the Judicial Council of the circuit, as does the House bill. In view of the overwhelming number of cases filed and pending in the bankruptcy courts and the impact on the economy and the public welfare of the litigation processed by the bankruptcy courts, it is important that there be separate representation of the bankruptcy court on the Judicial Conference and the Judicial Council of the circuit.

On page 44, section 249 of our legislative proposal, we are suggesting a method of staggering the appointments of bankruptcy judges over a period of three years in order that the court may function in a more stable and orderly fashion during the period of transition to an Article III court. We are suggesting that one-third of the appointments be made in 1983, one-third in 1984, and one-third in 1985. The transition period will begin on the date of enactment of this legislation. However, instead of ending at a universal fixed time in all districts, the transition period will end in a particular district when all Article III judges authorized for the district have been appointed and have assumed office or on September 30, 1985, whichever is earlier. It is anticipated that all appointments will have been completed by September 30, 1985 and the transition to an Article III court will have been completed by that date.

Standing Resolutions of the National Conference of Bankruptcy Judges respecting legislation:

(1) Resolved that the National Conference of Bankruptcy Judges reaffirms its strong support for legislation to reconstitute the bankruptcy court as an Article III Court and preserve the unified jurisdiction of the Court. Resolved further that in view of the serious questions raised by the Solicitor General and others about the validity of the stop-gap rule recently proposed by the Judicial Conference of the United States, it would not be prudent for the present Congress to postpone action of this matter in reliance on such rule as an effective interim remedy.

(2) Resolved that The National Conference of Bankruptcy Judges reaffirms its opposition to proposed amendments to the Bankruptcy Code to include in Chapter 7 a "threshold test," the effect of which would be to permit the court to deny relief to an individual debtor under Chapter 7 if the court determines that such debtor could pay a reasonable portion of his debts out of anticipated disposable future income.

RESPONSES OF JUDGE LEE TO WRITTEN QUESTIONS OF SENATOR DOLE

1. Q. Judge Merrick has indicated to this Committee that he is speaking for himself. Your statement suggests that you are appearing on behalf of the Bankruptcy Judge Conference. Is this the case?

A. The National Conference of Bankruptcy Judges has a Committee on Legislation and has delegated to the Committee authority to represent the Conference with respect to legislative matters. I am chairman of the committee and am authorized to speak for the Conference.

Since 1977 the Conference has consistently supported legislation to constitute the bankruptcy court as an independent Article III court, and I am sure Judge Merrick supports that objective.

2. Q. In the July testimony before this Subcommittee, the Bankruptcy Conference admitted two legislative proposals. I take it that as an attachment to your testimony today, you are submitting a third proposal. Of the three, do you have a preference?

A. The two legislative proposals we submitted in July, 1982, labeled A and B both provide for establishment of an independent bankruptcy court as a court of record in each judicial district. The difference between the two proposals relates to the manner of appointment of bankruptcy judges. Proposal A provides that commencing April 1, 1984, judges of the bankruptcy court shall be appointed by the President to hold office during good behavior; Proposal B provides for folding in incumbent judges to hold office during good behavior.

In the letter inviting us to appear today (November 10, 1982) we were asked to comment on the provisions of the Senate amendments "which would create a bankruptcy division of the district court as proposed by the Justice Department."

We prefer the approach in our proposals A and B and in Congressman Rodino's bill, H.R. 6978, which involves creation of a bankruptcy court in each judicial district as a separate court of record. That is what should be done.

The proposal we are offering today suggests that if the bankruptcy court should be established as a division of the district court at the very least it should be created as an independent division of record with its own clerk and supporting personnel.

In sum, we do not think the Justice Department's proposal that involves merging the bankruptcy court into the district court is workable. We urge the independent court approach proposed in the Rodino bill.

3. Q. Your statement opposes "fungibility" for bankruptcy judges if Congress gives them full district court status. We hope and expect that the current heavy workload of the bankruptcy courts will not continue indefinitely. Would it not, then, be advisable to allow the bankruptcy judges to handle other matters if their caseload permits? Couldn't this be a very substantial factor in improving relations between bankruptcy judges and other federal judges? From the standpoint of your own professional development, wouldn't it be desireable, from time to time, to handle non-bankruptcy matters?

A. The number of bankruptcy judges proposed in the Senate amendments and in the Rodino bill is approximately the number in office in 1978 when bankruptcy filing approximated 200,000 cases per annum.

This was prior to enactment of the new Bankruptcy Code which expanded the judicial responsibilites of the bankruptcy judge.

We fully expect bankruptcy filings to recede because we adhere to the view that the recent increase in filings is primarily due to the downturn in the ecomony which coincided with the effective date of the new law rather than to the new law itself as some would have Congress believe. But even if bankruptcy filings recede by 160,000 cases to the pre-Code level the workload of the 227 bankruptcy judges provided for in this legislation will still be too great for them to undertake additional duties.

It appears to us that fungibility should be considered only if the number of bankruptcy judges provided for in this legislation is increased to approximately 305, the number which the Administrative Office of United States Courts estimates is necessary to properly handle the present workload of the bankruptcy court.

The nature and complexity of civil litigation handled by bankruptcy courts is as challenging and diverse as the civil litigation processed by the district courts. The opportunity for professional development and exposure to all areas of the law, except criminal law, exists without fungibility.

4. Q. You have suggested a three year transition period for appointment of the new bankruptcy judges in your proposal. Is it reasonable to expect that the Supreme Court would condone such a long transition period?

A. It is reasonable to assume the Supreme Court will condone a three-year transition period.

In Glidden Company v. Zdanok, 82 S.Ct. 1459 (1962), the Supreme Court acknowledged the existence of a rule that judges with limited tenure may exercise the judicial power of the United States for a transitory period where the need for them to do so is dictated by practical necessities.

One of the cases cited in footnote 15 in Glidden is Metlakatla Indian Community Annette Island Reserve v. Egan, 363 U.S. 555, 80 S.Ct. 1321, 4 L.Ed. 2d 1397 (1960). In that case the interim Alaskan District Court (the former territorial district court) was authorized to continue to exercise jurisdiction over state law matters for a period of up to three years after Alaska became a state, pending organization of Alaska state courts and a U. S. district court.

In view of the precedent set in the Alaska Statehood Act, 72 Stat. 339, we believe a three-year period is reasonable and constitutional.

If the constitutionality of this approach to avoiding an interregnum in judicial administration of bankruptcy cases during transition should be questioned the issue before the Supreme Court will be quite different from the question presented in the Northern Pipeline Construction Company case. In that case the proposal under attack would have permitted untenured judges to exercise the judicial power of the United States permanently. The plurality of members of the court were of the view that such an arrangement would undermine the independence of the judiciary.

No substantial menace to the independence of the judiciary is posed by permitting untenured judges to exercise the judicial power of the United States during a rational period of transition to a tenured court. The purpose of the transition period is to maintain order while eliminating the menace.

Practical considerations inherent in the nomination, screening and confirmation processes for appointment of Article III judges suggest a functional transition period of at least three years.

5. Q. Your proposal also calls for independant status of bankruptcy clerks. This would seem to be creating an unnecessary and redundant administrative machine. Couldn't a bankruptcy division of one clerk's office handle the functions just as well?

A. Preserving the present independent status of bankruptcy clerks does not involve the creation of an unnecessary and redundant administrative machine.

The separate clerks offices now exist and are already staffed. No additional cost or duplication of services is involved or anticipated in maintaining these offices.

As I indicated in my prepared statement, prior experiments that involve merging these offices into the district court clerk's offices resulted in considerable chaos and were detrimental to bankruptcy administration.

There is really no duplication of work because the functions of the two offices are quite different.

The bankruptcy court clerk and the judge of the bankruptcy court are responsible for a far greater caseload than the clerk of the district court. If this work is to be handled expeditiously the clerk of the bankruptcy court must be responsible directly to the bankruptcy judge.

I refer you to Senate Report No. 95-984, 95th Cong., 2d Sess., a copy of which is attached.

Calendar No. 917

95TH CONGRESS } SENATE { REPORT
2d Session } { No. 95-984

CONSOLIDATED CLERKS OF COURT REVISION

JULY 13 (legislative day, MAY 17), 1978.—Ordered to be printed

Mr. DECONCINI, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 3107]

The Committee on the Judiciary, to which was referred the bill (S. 3107) to amend title 28, United States Code to provide for uniform supervision and control of employees of referees in bankruptcy, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE OF THE BILL

The bill reemphasizes the authority of the bankruptcy judge to employ, direct, and remove assistants and preclude the Director of the Administrative Office of the U.S. Courts from using funds appropriated for the operation of the bankruptcy system to pay the salaries of clerical assistants who are not utilized exclusively in the processing of bankruptcy cases under the direct supervision of the bankruptcy judge.

STATEMENT

In 1946 Congress amended section 40(c) of the Bankruptcy Reform Act, 11 U.S.C. 68(c), to create in the Treasury of the United States trust funds into which are paid charges assessed against bankrupt estates and a portion of the filing fee in each bankruptcy case. See Public Law 464, 79th Congress, (c) 512, 2d session, approved June 28, 1946.

The salaries of bankruptcy judges and their expenses, including the salaries of their clerical assistants, are paid out of moneys assessed against bankrupt estates and covered into the Treasury of the United States for the account of these trust funds, and out of such additional moneys as Congress may appropriate for these trust funds. See Senate Report No. 959, 79th Congress, 2d session, February 15, 1946; United States Code Congressional Service, 79th Congress, page 1231. It was the intention of Congress that bankruptcy offices which are supported out of moneys appropriated for these trust funds be maintained separate and apart from the offices of the U.S. district court clerk and that clerical assistants of bankruptcy judges whose salaries are paid out of trust fund money be utilized exclusively in the processing of bankruptcy cases. Otherwise, it would have been unconscionable to assess bankrupt estates and ultimately creditors for the salaries of these clerks.

In recent years a number of U.S. district courts have entered orders of consolidation directing that clerical assistants of bankruptcy judges be integrated into the staff of U.S. district court clerk and placed under the supervision of the clerk. In these offices bankruptcy clerks who are paid out of moneys generated by assessments against bankrupt estates have been assigned to work in other areas of court administration such as passports, naturalization, and in the maintenance of dockets in civil and criminal cases. This has occurred during a period of great increase in the bankruptcy filings and while the bankruptcy court staffs were hard pressed with work of their own to perform. During the course of hearings on bankruptcy reform legislation, there was extensive testimony to the effect that these office consolidations are jeopardizing the efficiency of the bankruptcy courts. It is the committee's feeling that consolidation of clerical staffs generally works a disservice to parties before the bankruptcy courts and that this legislation clarifies the 1946 amendments to the Bankruptcy Act so as to reiterate the intention of Congress that bankruptcy offices shall be maintained separate and apart from the offices of the U.S. district court clerk in bankruptcy cases.

This legislation is also intended to preserve the separateness and efficiency of the bankruptcy courts during the period of transition to the new bankruptcy court system proposed in the bankruptcy reform legislation now pending in Congress. Under that legislation it is made clear that the offices of the clerks of the bankruptcy court and district court shall be separate. By implementing S. 3107 at this time it is hoped the transition of those courts where consolidation has occurred will take place in a smoother and more efficient manner.

The committee was made aware during consideration of this legislation that in 2 or 3 of the 14 consolidated offices around the country the experiment in consolidation of the offices, had, in fact, worked well. The key factor in those districts was that the clerk of the district court was experienced in the problems and needs of the bankruptcy courts and devoted the necessary time and personnel to the bankruptcy courts to permit it to function well. The committee applauds the imaginative efforts of these clerks and the Administrative Office of the U.S. Courts in attempting new innovations in court administration, while at the same time concluding that the consolidation of clerks offices has generally resulted in a less efficient system of justice than could be expected from separate offices.

SECTION-BY-SECTION ANALYSIS

The bill amends paragraphs (2) and (3) of subdivision a of section 62 of the Bankruptcy Act (11 U.S.C. 102 (a) (2) and (3).

New paragraph (2) will provide that actual and necessary expenses of referees shall be authorized and approved by the Director of the Administrative Office of the U.S. Courts. Clerical, stenographic, and other assistants of referees shall be paid at rates not less than the rates for comparable services prevailing in the respective office of the clerks of the district courts. Expenses may be allowed by the judge of the judicial district when it is infeasible to obtain the approval of the Director.

New paragraph (3) allows the referee with the approval of the Director to employ necessary employees. The referee at his pleasure may remove an employee. It also clarifies that all employees of the referee shall be utilized under the direct supervision of the referee exclusively in the processing of bankruptcy cases. Present law is continued in that the Director may utilize funds collected or appropriated for the referees' salary fund and the referees' expense fund pursuant to section 40c of the Bankruptcy Act to pay the salaries of employees under the direct supervision of the referee and employees of the Bankruptcy Division of the Administrative Office of the U.S. Courts. If the office of the referee shall become vacant, the employment of his assistants shall not thereupon be terminated unless the Director during such vacancy determines that the services of such assistant are no longer necessary.

COST ESTIMATE

It is estimated that there will be no cost impact associated with this bill.

CONGRESSIONAL BUDGET OFFICE,
U.S. CONGRESS,
Washington, D.C., July 13, 1978.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary, U.S. Senate, Dirksen Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 3107, a bill to amend the Bankruptcy Act to provide for uniform supervision and control of employees of referees in bankruptcy, as ordered reported by the Senate Committee on the Judiciary, July 12, 1978.

Based on this review, it appears that no additional cost to the Government would be incurred as a result of enactment of this bill.

Sincerely,

ALICE M. RIVLIN,
Director.

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXXIX of the Standing Rules of the Senate, changes in existing law made by the bill as reported are shown as follows: Existing law is shown in roman, matter repealed enclosed in black brackets, and new matter is printed in italic.

That paragraphs (2) and (3) of subdivision a of section 62 of the Bankruptcy Act (11 U.S.C. 102(a)(2) and (3)) are amended to read as follows:

"(2) The actual and necessary office and other expenses of referees shall be authorized and approved by the Director, including compensation of clerical, stenographic and other assistants of referees at rates fixed by the Director, *at rates not less than* the rates for comparable services prevailing in the respective offices of the clerks of the several district courts, and the costs of establishing and maintaining their offices with equipment and supplies, adequate for their efficient and economical operation, including mechanical equipment and devices and law libraries. Such expenses may be allowed when authorized by a judge of the judicial district or districts in which a referee serves in cases of emergency where it is not feasible to secure prior authorization of the Director.

"(3) When, in the opinion of the Director the public interest requires it, he may, on the recommendation of a referee, which recommendation shall state facts showing the necessity for the same, allow the referee to employ necessary clerical, stenographic, and other assistants. *All employees of the referee shall be utilized under the direct supervision of the referee exclusively in the processing of bankruptcy cases.* The referee may at his pleasure remove any assistant in his employ. *The authority of the referee to employ, direct and remove assistants may not be exercised by anyone other than the referee. The Director may utilize funds collected or appropriated for the referees' salary fund and the referees' expense fund pursuant to section 40c of this Act, to pay the salaries of only such clerical, stenographic, or other assistants as are employed under the direct supervision of the referee in the office of the referee: Provided, however, salaries of the employees of the Bankruptcy Division of the Administrative Office of the United States Courts may also be paid out of such funds.* If the office of the referee shall become vacant, the employment of his assistants shall not thereupon be terminated: *Provided, however*, That during such vacancy the Director may terminate the employment of any assistant, if, in his opinion, the services of such assistant are no longer needed."

○

Subcommittee on Courts
Senate Judiciary Committee
November 10, 1982

Legislative Draft to Accompany
Testimony of Judge Joe Lee

TITLE II - JUDICIAL POWERS AMENDMENTS

Subtitle A--Bankruptcy Court Act

SHORT TITLE

SEC. 201. This subtitle may be cited as the "Bankruptcy Court Act of 1982".

BANKRUPTCY DIVISION OF THE UNITED STATES COURTS

SEC. 202. (a) Title 28 of the United States Code is amended by inserting after chapter 5 the following new chapter:

"CHAPTER 6--BANKRUPTCY COURTS

"Sec.
"151. Creation and composition of bankruptcy courts.
"152. Appointment of bankruptcy judges.
"153. Tenure and residence of bankruptcy judges.
"154. Salaries of bankruptcy judges.
"155. Chief judge; precedence of bankruptcy judges.
"156. Division of business among bankruptcy judges.
"157. Times and places of holding court.
"158. Vacant judgeship as affecting proceedings.
"159. Appellate panels.

"§151. Creation and composition of bankruptcy courts

"(a) There shall be in each judicial district an autonomous division of record of the district court known as the United States Bankruptcy Court for the district.

"(b) Each bankruptcy court shall consist of the bankruptcy judge or judges for the district in regular active service. Justices or judges designated and assigned shall be competent to sit as judges of the bankruptcy court.

"(c) Except as otherwise provided by law, or rule, or order of court, the judicial power of a bankruptcy court with respect to any action, suit, or proceeding may be exercised by a single bankruptcy judge, who may preside alone and hold a regular or special session of court at the same time other sessions are held by other bankruptcy judges.

"§152. Appointment of bankruptcy judges

"The President shall appoint, by and with the advice and consent of the Senate, bankruptcy judges for the several judicial districts, as follows:

"Districts	Judges
Alabama:	
Northern	4
Middle	2
Southern	2
Alaska	1
Arizona	4
Arkansas:	
Eastern	1
Western	1
California:	
Northern	7
Eastern	4
Central	12
Southern	3
Colorado	4
Connecticut	2
Delaware	1
District of Columbia	1
Florida:	
Northern	1
Middle	2
Southern	3
Georgia:	
Northern	4
Middle	2
Southern	1
Hawaii	1
Idaho	1
Illinois:	
Northern	8
Central	2
Southern	1
Indiana:	
Northern	2
Southern	4
Iowa:	
Northern	1
Southern	1
Kansas	3
Kentucky:	
Eastern	1
Western	2
Louisiana:	
Eastern	2
Middle	1
Western	2
Maine	2
Maryland	2
Massachusetts	4
Michigan:	
Eastern	4
Western	2
Minnesota	4
Mississippi:	
Northern	1
Southern	2

Missouri:	
Eastern	3
Western	3
Montana	1
Nebraska	1
Nevada	2
New Hampshire	1
New Jersey	5
New Mexico	1
New York:	
Northern	2
Southern	7
Eastern	6
Western	3
North Carolina:	
Eastern	2
Western	1
Middle	2
North Dakota	1
Ohio:	
Northern	8
Southern	7
Oklahoma:	
Northern	1
Eastern	1
Western	2
Oregon	4
Pennsylvania:	
Eastern	3
Middle	2
Western	3
Puerto Rico	2
Rhode Island	1
South Carolina	1
South Dakota	1
Tennessee:	
Eastern	2
Middle	2
Western	2
Texas:	
Northern	3
Southern	3
Eastern	1
Western	2
Utah	2
Vermont	1
Virginia:	
Eastern	3
Western	2
Washington:	
Eastern	1
Western	4
West Virginia:	
Northern	1
Southern	1
Wisconsin:	
Eastern	3
Western	1
Wyoming	1

"§153. Tenure and residence of bankruptcy judges

"(a) The bankruptcy judges shall hold office during good behavior.

"(b) Each bankruptcy judge, other than a bankruptcy judge of the United States Bankruptcy Court for the District of Columbia, shall reside in the district or one of the districts for which he is appointed.

"(c) If the public interest and the nature of the business of a bankruptcy court require that a bankruptcy judge should maintain his abode at or near a particular place for holding court in the district or within a particular part of the district the judicial council of the circuit may so declare and may make an appropriate order. If the bankruptcy judges of such a district are unable to agree as to which of them shall maintain his abode at or near the place or within the area specified in such an order the judicial council of the circuit may decide which of them shall do so.

"§154. Salaries of bankruptcy judges

"Each bankruptcy judge shall receive a salary equal to the salary as may from time to time be in effect for a judge of a district court of the United States other than the chief judge of the United States District Court for the District of Columbia.

"§155. Chief judges; precedence of bankruptcy judges

"(a)(1) In any district having more than one bankruptcy judge, the chief judge of the district shall be the bankruptcy judge in regular active service who is senior in commission of those judges who--

"(A) are sixty-four years of age or under;

"(B) have served for one year or more as a bankruptcy judge; and

"(C) have not served previously as chief judge.

"(2)(A) In any case in which no bankruptcy judge meets the qualifications of paragraph (1), the youngest bankruptcy judge in regular active service who is sixty-five years of age or over and who has served as bankruptcy judge for one year or more shall act as the chief judge.

"(B) In any case under subparagraph (A) in which there is no bankruptcy judge in regular active service who has served as a bankruptcy judge for one year or more, the bankruptcy judge in regular active service who is senior in commission and who has not served previously as chief judge shall act as the chief judge.

"(3)(A) Except as provided in subparagraph (C), the chief judge of the district appointed under paragraph (1) shall serve for a term of seven years and shall serve after expiration of such term until another judge is eligible under paragraph (1) to serve as chief judge of the district.

"(B) Except as provided in subparagraph (C), a bankruptcy judge acting as chief judge under subparagraph (A) or (B) of paragraph (2) shall serve until a judge has been appointed who meets the qualifications under paragraph (1).

"(C) No bankruptcy judge may serve or act as chief judge of the district after attaining the age of seventy years unless no other bankruptcy judge is qualified to serve as chief judge of the district under paragraph (1) or is qualified to act as chief judge under paragraph (2).

"(b)(1) The chief judge shall have precedence and preside at any sesion which he attends.

"(2) Other bankruptcy judges shall have precedence and preside according to the seniority of their commissions. Judges whose commissions bear the same date shall have precedence according to seniority in age.

"(c) A judge whose commission extends over more than one district shall be junior to all bankruptcy judges except in the district in which he resided at the time he entered upon the duties of his office.

"(d) If the chief judge desires to be relieved of his duties as chief judge while retaining his active status as bankruptcy judge, he may so certify to the Chief Justice of the United States, and thereafter, the chief judge of the district shall be such other bankruptcy judge who is qualified to serve or act as chief judge under subsection (a).

"(e) If a chief judge is temporarily unable to perform his duties as such, they shall be performed by the bankruptcy judge in active service, present in the district and able and qualified to act, who is next in precedence.

"(f) Service as a referee in bankruptcy or as a bankruptcy judge under the Bankruptcy Act, as well as service under the Act of November 6, 1978 (Public Law 95-598; 92 Stat. 2683), shall be taken into account in the determination of seniority of commission under this section.

"§156. Division of business among bankruptcy judges

"(a) The business of a bankruptcy court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.

"(b) The chief judge of the bankruptcy court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.

"(c) If the bankruptcy judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders.

"§157. Times and places of holding court

"(a) The bankruptcy court at each designated place shall be deemed to be in continuous session on all business days throughout the year.

"(b) Each bankruptcy court may establish by local rule or order schedules of court sessions at designated places of holding court other than the headquarters office of the court. Such schedules may be pretermitted by order of the court.

"(c) Bankruptcy court may be held at any place within the district served, in any case, on order of the bankruptcy court, for the convenience of the parties, on such notice as the bankruptcy court orders.

"§158. Vacant judgeship as affecting proceedings

"When the office of a bankruptcy judge becomes vacant, all pending process, pleadings, and proceedings shall, when necessary, be continued by the clerk until a judge is appointed or designated to hold such court.

"§159. Appellate panels

"(a) If the circuit council of a circuit orders application of this section to a district within such circuit, the chief judge of the circuit shall designate panels of three bankruptcy judges to hear appeals from judgments, orders, and decrees of the bankruptcy court of the United States for such district. Except as provided in section 293(e) of this title, a panel shall be composed only of bankruptcy judges for districts located in the circuit in which the appeal arises. The chief judge shall designate a sufficient number of such panels so that appeals may be heard and disposed of expeditiously.

"(b) A panel designated under subsection (a) of this section may not hear an appeal from a judgment, order, or decree entered by a member of the panel.

"(c) When hearing an appeal, a panel designated under subsection (a) of this section shall sit at a place convenient to the parties to the appeal."

"6. Bankruptcy courts.................................. 151".

SEC. 203. Section 291(b) of title 28, United States Code, is amended by inserting "or bankruptcy" after "to hold a district".

SEC. 204. Section 292(b) of title 28, United States Code, is amended by inserting "or a bankruptcy court" after "to hold a district court".

SEC. 205. Section 292(d) of title 28, United States Code, is amended--

(1) by striking out "either",

(2) by inserting "bankruptcy court," after "in a", and

(3) by inserting a comma after "district court".

SEC. 206. (a) Section 293 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(e)(1) The Chief Justice of the United States may designate and assign temporarily a bankruptcy judge of one circuit to perform judicial duties in another circuit in a bankruptcy court upon presentation of a certificate of necessity by the chief judge of the circuit wherein the need arises and if such designation and assignment will not impair the expeditious determination of cases pending in the bankruptcy court in which such bankruptcy judge sits.

"(2) The chief judge of a circuit may, in the public interest, designate and assign temporarily a bankruptcy judge of the circuit to hold a bankruptcy court in any district within the circuit.".

(b) The heading of section 293 of title 28, United States Code, is amended to read "Judges of other courts".

(c) The item relating to section 293 in the table of sections of chapter 13 of title 28, United States Code, is amended to read:

"293. Judges of other courts.".

SEC. 207. Section 294 of title 28, United States Code, is amended--

(1) in subsection (c) by striking out "or district" and inserting in lieu thereof ", district, or bankruptcy", and

(2) in subsection (d)--

(A) in the first sentence by striking out "or district" and inserting in lieu thereof ", district, or bankruptcy",

(B) in the second sentence by striking out "or district" and inserting in lieu thereof ", district, or bankruptcy", and

(C) in the third sentence by striking out "or district court" and inserting in lieu thereof ", district court, or bankruptcy court".

SEC. 208. Section 295 of title 28, United States Code, is amended by striking out "or district" and inserting in lieu thereof ", district, or bankruptcy".

SEC. 209. Section 331 of title 28, United States Code, is amended--

(1) in the first paragraph by striking out "and a district judge from each judicial circuit" and inserting in lieu thereof ", and a district judge and a bankruptcy judge from each judicial circuit,",

(2) in the second paragraph--

(A) by striking out ", except that" and all that follows through "three years", and

(B) by inserting at the end thereof the following: "The bankruptcy judge to be summoned from each judicial circuit shall be chosen by the circuit and bankruptcy judges of the circuit at the annual judicial conference of the circuit held pursuant to section 333 of this title and shall serve as a member of the conference for three successive years, except that in the year following the effective date of this sentence the circuit and bankruptcy judges in the first, fourth, seventh, and tenth circuits shall choose a bankruptcy judge to serve for one year, the circuit and bankruptcy judges in the second, fifth, eighth, and eleventh circuits shall choose a bankruptcy judge to serve for two years and the circuit and bankruptcy judges in the third, sixth, ninth, and District of Columbia circuits shall choose a bankruptcy judge to serve for three years.", and

(3) in the third paragraph--

(A) by striking out "or the district judge" and inserting in lieu thereof "or the district or bankruptcy judge", and

(B) by striking out "or district" and inserting in lieu thereof ", district, or bankruptcy".

SEC. 210. Section 332(a) of title 28, United States Code, is amended--

(1) in paragraph (1)(C)--

(A) by inserting "and bankruptcy judges of the circuit" after "district judges of the circuit", and

(B) in clause (i) and clause (ii) by striking out "the number of district judges" each place it appears and inserting in lieu thereof "the aggregate number of district and bankruptcy judges",

(2) in paragraph (3) by striking out "circuit and district" and inserting "circuit, district, and bankruptcy" in lieu thereof,

(3) in paragraph (4) by striking out "circuit and district" and inserting in lieu thereof "circuit, district, and bankruptcy", and

(4) in paragraph (5) by adding at the end thereof the following: "No more than one bankruptcy judge from any one district shall serve simultaneously on the council, unless at least one bankruptcy judge from each district within the circuit is already serving as a member of the council.".

SEC. 211. (a) The fourth paragraph of section 372(a) of title 28, United States Code, is amended by striking out "or district" and inserting in lieu thereof ", district, or bankruptcy".

(b) Section 372(b) of title 28, United States Code, is amended by striking out "or district" and inserting in lieu thereof ", district, or bankruptcy".

(c) Section 372(c)(6)(B)(vii) of title 28, United States Code, is amended by striking out "and any removal of a bankruptcy judge shall be in accordance with section 153 of this title".

SEC. 212. The table of sections of chapter 17 of title 28, United States Code, is amended by striking out the item relating to section 375.

SEC. 213. (a) Section 376(a)(1) of title 28, United States Code, is amended--

(1) by redesignating subparagraphs (C), (D), and (E) as subparagraphs (D), (E), and (F), respectively,

(2) by inserting after subparagraph (B) the following new subparagraph:

"(C) a bankruptcy judge, as defined by section 377(i) of this title;",

(3) by striking out "or" before "(iii)", and

(4) by inserting before the semicolon at the end thereof ", or (iv) in the case of a bankruptcy judge, as defined by section 377(i) of this title, the date of the enactment of the Bankruptcy Court Act of 1982".

(b) Section 376(a)(2) of title 28, United States Code, is amended--

(1) by redesignating subparagraphs (C), (D), and (E) as subparagraphs (D), (E), and (F), respectively, and

(2) by inserting after subparagraph (B) the following new subparagraph:

"(C) in the case of a bankruptcy judge, as defined by section 377(i) of this title, retirement pay received after retirement from office under section 377;".

SEC. 214. (a) Chapter 17 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§377. Bankruptcy transition judges

"(a) A bankruptcy judge who is not appointed under section 152 of this title to the bankruptcy court after the date of enactment of the Bankruptcy Court Act of 1982, shall be eligible to retire and to receive retirement pay under subsection (c) of this section after attaining the age of sixty years, if such judge--

"(1) continues in service until the expiration of such judge's term of office as provided in section 249(c) of the Bankruptcy Court Act of 1982;

"(2) serves as a bankruptcy judge for at least ten years; and

"(3) advises the President in writing, not later than sixty days prior to the expiration of such judge's term of office as provided in section 249(c) of the Bankruptcy Court Act of 1982, that such judge is willing to accept appointment under section 152 of this title to the bankruptcy court.

"(b) Any bankruptcy judge who becomes permanently disabled from performing the duties of the office shall retire.

"(c)(1) A bankruptcy judge who elects under subsection (d) of this section to receive retirement pay under this subsection and who retires under subsection (a) of this section shall receive retirement pay for any period at a rate equal to the product of--

"(A) the average pay of such judge; and

"(B) the sum of--

"(i) the aggregate of the number of years the bankruptcy judge who so elects served as a bankruptcy judge and his military service not exceeding five years, divided by 40; and

"(ii) the number of years of other service as an employee, which except for the election of the bankruptcy judge who so elects, would be creditable under section 8332 of title 5, United States Code, divided by 58;

except that the rate of retirement pay shall not exceed 80 per centum of the rate of salary payable to such judge on the date such judge relinquishes office.

"(C) For purposes of this subsection average pay means the largest annual rate resulting from averaging a judge's rate of basic pay in effect over any three consecutive years of creditable service with each rate weighted by the time it was in effect.

"(2) A bankruptcy judge who elects under subsection (d) of this section to receive retirement pay under this subsection and who retires under subsection (b) of this section shall receive retirement pay for any period at a rate--

"(A) equal to the rate of salary payable to such judge immediately preceding the date his retirement commences, for a comparable period, if before such retirement such judge serves as a bankruptcy judge not less than ten years; or

"(B) equal to 50 per centum of the rate of salary payable to such judge immediately preceding the date his retirement commences, for a comparable period, if before such retirement such judge serves as a bankruptcy judge less than ten years;

except that the rate of such retirement pay shall not exceed the rate of salary payable to such judge on March 31, 1983.

"(3)(A) Such retirement pay shall begin to accrue on the day following the day on which such bankruptcy judge becomes eligible to retire under subsection (a) or (b) and shall continue to accrue during the remainder of the life of such judge.

"(B) Retirement pay accruing under this section shall be adjusted under section 154 of this title and paid in the same manner as the salary of a United States bankruptcy judge.

"(4) In computing the rate of retirement pay under this subsection, that portion of the aggregate number of years of service which is a fractional part of one year shall be eliminated if it is less than six months, or shall be counted as a full year if such part equals or exceeds six months.

"(d)(1) A bankruptcy judge may elect to receive retirement pay under subsection (c) of this section by filing notice of such election in writing with the Director of the Administrative Office of the United States Courts. The Director shall transmit to the Office of Personnel Management a copy of each notice filed under this paragraph.

"(2) Such election may be made by a bankruptcy judge only during such judge's term of office.

"(e) In the case of any bankruptcy judge who files an election pursuant to subsection (d) of this section to receive retirement pay under subsection (c) of this section--

"(1) no annuity or other payment shall be payable in any period during which such election is in effect to such judge under the civil service retirement laws with respect to any service performed by such judge (whether performed before or after such election is filed and whether performed as a bankruptcy judge or otherwise);

"(2) no deduction for purposes of the Civil Service Retirement and Disability Fund shall be made from retirement pay payable to such judge under subsection (c) of this section or from any other salary, pay, or compensation payable to such judge for any period during which such election is in effect;

"(3) for purposes of section 376(a) of this title, such judge shall be deemed to have notified, on the date such election is filed, the Director of the Administrative Office of the United States Courts of such judge's intention to come within the purview of section 376 of this title; and

"(4) notwithstanding section 8342 of title 5, United States Code, the lump sum credit of such judge computed under section 8331(8) of title 5, United States Code, shall be transferred from the individual account of such judge in the Civil Service Retirement and Disability Fund to the individual account of such judge in the Judicial Survivors' Annuities Fund. Any surplus moneys in such judge's account in the Judicial Survivors' Annuities Fund resulting from such transfer shall be retained in such account and administered under section 376 of this title.

"(f) A bankruptcy judge who desires to retire under subsection (b) of this section shall furnish to the Director of the Administrative Office of the United States Courts a certificate of disability signed by the chief judge of the circuit in which such bankruptcy judge is serving.

"(g)(1) A bankruptcy judge who files an election under subsection (d) of this section to receive retired pay under subsection (c) of this section may revoke such election at any time before the first day on which retirement pay would begin to accrue with respect to such judge but for such revocation.

"(2) Any revocation under this subsection of an election shall be made by filing notice of such revocation with the Office of Personnel Management. The Office of Personnel Management shall transmit to the Director of the Administrative Office of the United States Courts a copy of each notice filed under this paragraph.

"(3) In the case of a bankruptcy judge who revokes under this subsection an election made under subsection (d) of this section--

"(A) for purposes of this section, such judge shall be treated as not having filed such election;

"(B) for purposes of section 376 of this title--

"(i) such judge shall be treated as not having filed an election under subsection (a)(1) of such section; and

"(ii) subsection (g) of such section shall not apply with respect to such judge, and the amount credited to such judge's account under subsection (e) of such section and subsection (e)(5) of this section, together with interest at 4 per centum per annum to December 31, 1947, and 3 per centum per annum thereafter, compounded on December 31, of each year to the date on which the revocation is filed, shall be returned to such judge; and

"(C)(i) for purposes of the civil service retirement laws, no credit shall be allowed for service as a bankruptcy judge or otherwise unless with respect to such service such judge deposits in the Civil Service Retirement and Disability Fund the amount required by the civil service retirement laws; and

"(ii) if such judge deposits the amount so required, then the Administrative Office of the United States Courts shall deposit in the Civil Service Retirement and Disability Fund an amount equal to the amount it would have contributed to such Fund but for the effectiveness of the election made by such judge under subsection (d) of this section to receive retirement pay under subsection (c) of this section. Upon such deposit, service as a bankruptcy judge shall be treated as service with respect to which deductions and contributions had been made during the period of such service.

"(h) Except as otherwise provided in this subsection, the provisions of the civil service retirement laws, including the provisions relating to the deduction and withholding of amounts from basic pay, salary, and compensation, shall apply with respect to service as a bankruptcy judge, together with other service as an officer or employee to whom such civil service retirement laws apply, as if this section had not been enacted.

"(i) For purposes of this section, the term 'bankruptcy judge' means a bankruptcy judge referred to in section 248(a) of the Bankruptcy Court Act of 1982.".

(b) The table of sections for chapter 17 of title 28, United States Code, is amended by adding at the end thereof the following new item:

"377. Bankruptcy transition judges.".

SEC. 215. Section 451 of title 28, United States Code, is amended--

(1) by striking out "including" and inserting in lieu thereof ", bankruptcy courts," in the paragraph beginning with "The term 'court of the United States' ", and

(2) by inserting "bankruptcy courts," after "district courts," in the paragraph beginning with "The term 'judge of the United States' ".

SEC. 216. (a) Section 456(b) of title 28, United States Code, is amended--

(1) by striking out "and" the last place it appears, and

(2) by inserting ", and the United States Bankruptcy Court for the District of Columbia" after "United States District Court for the District of Columbia".

(b) Section 456(d) of title 28, United States Code, is amended--

(1) by inserting "and each bankruptcy judge" after "each district judge", and

(2) by inserting "or bankruptcy court, as the case may be," after "a district court".

(c) Section 456(g) of title 28, United States Code, is amended by striking out "or district" and inserting in lieu thereof ", district, or bankruptcy".

SEC. 217. Section 457 of title 28, United States Code, is amended by striking out "of district courts" and inserting in lieu thereof "of bankruptcy courts, of district courts,".

SEC. 218. Section 569(a) of title 28, United States Code, is amended by striking out "of the district court" and inserting in lieu thereof "of the bankruptcy court, of the district court,".

SEC. 219. Section 571(b) of title 28, United States Code, is amended by striking out "and district" and inserting in lieu thereof ", district, and bankruptcy".

SEC. 220. (a) Section 604(a) of title 28, United States Code, is amended--

(1) by redesignating paragraph (17) as paragraph (18),

(2) by striking out paragraph (13), as added by section 225(a)(2) of the Act of November 6, 1978 (Public Law 95-598; 92 Stat. 2665), and

(3) by inserting after paragraph (16) the following new paragraph:

"(17) Lay before Congress, annually, statistical tables that will accurately reflect the business transacted by the several bankruptcy courts, and all other pertinent data relating to such courts;".

(b) Subsection (f) of section 604 of title 28, United States Code, as added by section 225(b) of the Act of November 6, 1978 (Public Law 95-598; 92 Stat. 2665) is redesignated as subsection (i).

SEC. 221. Section 610 of title 28, United States Code, is amended by striking out "and district courts" and inserting in lieu thereof ", district courts, and bankruptcy courts".

SEC. 222. Section 620(b)(3) of title 28, United States Code, is amended--

(1) by striking out "referees,", and

(2) by striking out "commissioners" and inserting in lieu thereof "magistrates".

SEC. 223. Section 621(a)(2) of title 28, United States Code, is amended by striking out "one" and inserting in lieu thereof "two".

SEC. 224. Section 631(c) of title 28, United States Code, is amended--

(1) by striking out "of the conference, a part-time referee in bankruptcy or" and inserting in lieu thereof "of the conference,", and

(2) by striking out "magistrate and part-time referee in bankruptcy," and inserting in lieu thereof "magistrate and".

SEC. 225. Section 232 of the Act of November 6, 1978 (Public Law 95-598; 92 Stat. 2665), shall take effect on the date of the enactment of this Act.

SEC. 226. (a) Title 28, United States Code, is amended by inserting after chapter 49 the following new chapter:

27

CHAPTER 50--BANKRUPTCY COURTS

"Sec.
"771. Clerks.
"772. Other employees.
"773. Reporters.
"774. Power to appoint.
"775. Salaries.

"§771. Clerks

"(a) Each bankruptcy court may appoint a clerk who shall be subject to removal by the court.

"(b) The clerk may appoint, with the approval of the court, necessary deputies, clerical assistants, and employees in such number as may be approved by the Director of the Administrative Office of the United States Courts. Such deputies, clerical assistants, and employees shall be subject to removal by the clerk with the approval of the court.

"(c) The clerk of each bankruptcy court shall reside in the district for which he is appointed. The bankruptcy court may designate places within the district for the offices of the clerk and his deputies, and their official stations.

"(d) A clerk of a bankruptcy court or his deputy or assistant shall not receive any compensation or emoluments through any office or position to which he is appointed by the court, other than that received as such clerk, deputy or assistant, whether from the United States or from private litigants.

"(e)(1) The clerk of each bankruptcy court shall pay into the Treasury all fees, costs, and other moneys collected by him, except uncollected fees not rquired by Act of Congress to be prepaid.

"(2) He shall make returns thereof to the Director of the Administrative Office of the United States Courts under regulations prescribed by the Director.

"§772. Other employees

"Bankruptcy judges may appoint necessary other employees, including law clerks and secretaries, subject to any limitation on the aggregate salaries of such employees which may be imposed by law.

"§773. Reporters

"(a)(1) Each bankruptcy court of the United States shall appoint one or more court reporters.

"(2) The number of reporters shall be determined by the Judicial Conference of the United States.

"(3) The qualifications of such reporters shall be determined by standards formulated by the Judicial Conference. Each reporter shall take an oath faithfully to perform the duties of his office.

"(4) Each such court, with the approval of the Director of the Administrative Office of the United States Courts, may appoint additional reporters for temporary service not exceeding three months, when there is more reporting work in the district than can be performed promptly by the authorized number of reporters and the urgency is so great as to render it impracticable to obtain the approval of the Judicial Conference.

"(5) If any such court and the Judicial Conference are of the opinion that it is in the public interest that the duties of reporter should be combined with those of any other employee of the court, the Judicial Conference may authorize such a combination and fix the salary for the performance of the duties combined.

"(b)(1) Each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method, subject to regulations promulgated by the Judicial Conference and subject to the discretion and approval of the judge. The regulations promulgated pursuant to the preceding sentence shall prescribe the types of electronic sound recording or other means which may be used and shall be the same as the regulations promulgated under section 753(b) of this title. Proceedings to be recorded under this section include (A) all proceedings in cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary and (B) such other proceedings as a judge of the court may direct or as may be required by rule or order of court as may be requested by any party to the proceeding.

"(2) The reporter or other individual designated to produce the record shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years.

"(3) The reporter or other individual designated to produce the record shall transcribe and certify such parts of the record of proceedings as may be required by any rule or order of court unless they have been recorded by electronic sound recording as provided in this subsection and the original records so taken have been certified by him and filed with the clerk as provided in this subsection. He shall also transcribe and certify such other parts of the record of proceedings as may be required by rule or order of court. Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee therefor, or of a judge of the court, the reporter or other individual designated to produce the record shall promptly transcribe the original records of the requested parts of the proceedings, attach to the transcript his official certificate, and deliver such transcript to the party or judge making the request.

"(4) The reporter or other designated individual shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.

"(5) The transcript in any case certified by the reporter or other individual designated to produce the record shall be deemed prima facie a correct statement of the testimony taken and proceedings had. No transcripts of the proceedings of the court shall be considered as official except those made from the records certified by the reporter or other individual designated to produce the record.

"(6) The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.

"(c) The reporters shall be subject to the supervision of the appointing court and the Judicial Conference in the performance of their duties, including dealings with parties requesting transcripts.

"(d) The Judicial Conference shall prescribe records which shall be maintained and reports which shall be filed by the reporters. Such records shall be inspected and audited in the same manner as the records and accounts of clerks of the district courts, and may include records showing--

"(1) the quantity of transcripts prepared;

"(2) the fees charged and the fees collected for transcripts;

"(3) any expenses incurred by the reporters in connection with transcripts;

"(4) the amount of time the reporters are in attendance upon the courts for the purpose of recording proceedings; and

"(5) such other information as the Judicial Conference may require.

"(e) Each reporter shall receive an annual salary to be fixed from time to time by the Judicial Conference of the United

States. All supplies shall be furnished by the reporter at his own expense.

"(f) Each reporter may charge and collect fees for transcripts requested by the parties, including the United States, at rates prescribed by the court subject to the approval of the Judicial Conference. The reporter shall not charge a fee for any copy of a transcript delivered to the clerk for the records of court. Fees for transcripts to persons permitted to appeal in forma pauperis shall also be paid by the United States if the trial judge or an appellate judge certifies that the appeal is not frivolous (but presents a substantial question). The reporter may require any party requesting a transcript to prepay the estimated fee in advance except as to transcripts that are to be paid for by the United States.

"(g) If, upon the advice of the chief judge of any bankruptcy court within the circuit, the judicial council of any circuit determines that the number of court reporters provided such bankruptcy court pursuant to subsection (a) of this section is insufficient to meet temporary demands and needs and that the services of additional court reporters for such bankruptcy court should be provided the judges of such bankruptcy court (including the senior judges thereof when such senior judges are performing substantial judicial services for such court) on a contract basis, rather than by appointment of court reporters as otherwise provided in this section, and such judicial council notifies the Director of the Administrative Office, in writing, of such determination, then the Director of the Administrative Office is authorized to and shall contract, without regard to section 3709 of the Revised Statutes of the United States, as amended (41 U.S.C. 5), with any suitable person, firm, association, or corporation for the providing of court reporters to serve such bankruptcy court under such terms and conditions as the Director of the Administrative Office finds, after consultation with the chief judge of the bankruptcy court, will best serve the needs of such bankruptcy court.

"§774. Power to appoint

"Whenever a majority of the bankruptcy judges of any bankruptcy court cannot agree upon the appointment of any officer of such court, the chief judge shall make such appointment.

"§775. Salaries

"The salary of an individual appointed or employed under section 771(a) or 773(a) of this title shall be the same as the salary of an individual appointed or employed under section 751(a) or 753(a) of this title, respectively. The salaries of individuals appointed under section 771(b) of this title shall be comparable to the salaries of individuals appointed under section 751(b) of this title.".

(b) The table of chapters of part III of title 28, United States Code, is amended by inserting after the item relating to chapter 49 the following new item:

"50. Bankruptcy Courts.................................. 771"

SEC. 227. Section 957 of title 28, United States Code, is amended by inserting "or bankruptcy court" after "district court".

SEC. 228. (a) Chapter 83 of title 28, United States Code, is amended by inserting after section 1292 the following new section:

"§1293. Bankruptcy appeals

"(a) The courts of appeals shall have jurisdiction of appeals from all final decisions of bankruptcy appellate panels established in section 159 of this title and from all final decisions of bankruptcy courts for districts to which the application of section 159 of this title is not ordered.

"(b) A court of appeals shall have jurisdiction of an appeal from a final judgment, order, or decree of a bankruptcy appellate panel or, notwithstanding section 1482 of this title, from a final judgment, order, or decree of a bankruptcy court of the United States if the parties to such appeal agree to a direct appeal to the court of appeals.".

(b) The table of sections of chapter 83 of title 28, United States Code, is amended by inserting after the item relating to section 1292 the following new item:

"1293. Bankruptcy appeals.".

SEC. 229. Section 1294 of title 28, United States Code, is amended--

(1) by striking out "district and territorial" and inserting in lieu thereof "district, bankruptcy, and territorial",

(2) by striking out the period at the end thereof and inserting a semicolon, and

(3) by adding at the end thereof the following new paragraphs:

"(5) From a panel of a bankruptcy appellate panel to the court of appeals for the circuit in which the appellate panel is so established,

"(6) From a bankruptcy court of the United States to the court of appeals for the circuit embracing the district in which the bankruptcy court is located.".

SEC. 230. (a)(1) Section 1364 of title 28, United States Code, as added by section 705(f)(1) of the Ethics in Government Act, is redesignated as section 1365.

(2) Section 705(a) of the Ethics in Government Act (2 U.S.C. 288d(a)) is amended by striking out "section 1364" and inserting in lieu thereof "section 1365".

(b) Section 1364 of title 28, United States Code, as added by section 172(c)(1) of the District of Columbia Court Reform and Criminal Procedure Act of 1970 and redesignated as section 1364 by section 6(b)(1) of the Jury System Improvement Act of 1978, is redesignated as section 1366.

(c) The table of sections of chapter 85 of title 28, United States Code, is amended--

(1) in the item relating to section 1330 by striking out "Action" and inserting in lieu thereof "Actions", and

(2) by striking out the three items relating to section 1364 and inserting in lieu thereof the following new items:

"1364. Direct actions against insurers of members of diplomatic missions and their families.
"1365. Senate actions.
"1366. Construction of references to laws of the United States or Acts of Congress.".

SEC. 231. Chapter 85 of title 28, United States Code, is amended--

(1) by striking out section 1334, and

(2) in the table of sections relating to such chapter by striking out the item relating to section 1334.

SEC. 232. Section 1360(a) of title 28, United States Code, is amended by striking out "within the Territory" and inserting in lieu thereof "within the State".

SEC. 233. (a) Title 28 of the United States Code is amended by inserting after chapter 89 the following new chapter:

"CHAPTER 90--BANKRUPTCY COURTS

"Sec.
"1471. Jurisdiction
"1472. Venue of cases under title 11.
"1473. Venue of proceedings arising under or related to cases under title 11.
"1474. Venue of cases ancillary to foreign proceedings.
"1475. Change of venue.
"1476. Creation or alteration of district or division.
"1477. Cure or waiver of defects.
"1478. Removal to the bankruptcy courts.
"1479. Provisonal remedies; security.
"1480. Jury trials.
"1481. Powers of bankruptcy court.
"1482. Appeals.

"§1471. Jurisdiction

"(a) Except as provided in subsection (b) of this section, the bankruptcy courts shall have original and exclusive jurisdiction of all cases under title 11.

"(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the bankruptcy courts, the bankruptcy courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.

"(c) Subsection (b) of this section does not prevent a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.

"(d) The bankruptcy court in which a case under title 11 is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of the case.

"§1472. Venue of cases under title 11

"Except as provided in section 1474 of this title, a case under title 11 may be commenced in the bankruptcy court for a district--

"(1) in which the domicile, residence, principal place of business, in the United States, or principal assets, in the United States, of the person or entity that is the subject of such case have been located for the 180 days immediately preceding such commencement, or for a longer portion of such 180-day period than such domicile, residence, principal place of business, in the United States, or principal assets, in the United States, were located in any other district; or

"(2) in which there is pending a case under title 11 concerning such person's affiliate, general partner, or partnership.

"§1473. Venue of proceedings arising under or related to cases under title 11

"(a) Except as provided in subsections (b) and (d) of this section, a proceeding arising under title 11 or arising in or related to a case under title 11 may be commenced in the bankruptcy court in which such case is pending.

"(b) Except as provided in subsection (d) of this section, a trustee in a case under title 11 may commence a proceeding arising in or related to such case to recover a money judgment of or property worth less than $1,000 or a consumer debt of less than $5,000 only in the bankruptcy court for the district in which a defendant resides.

"(c) Except as provided in subsection (b) of this section, a trustee in a case under title 11 may commence a proceeding arising in or related to such case as statutory successor to the debtor or creditors under section 541 or 544(b) of title 11 in the bankruptcy court for the district where the State or Federal court sits in which, under applicable nonbankruptcy venue provisions, the debtor or creditors, as the case may be, may have commenced an action on which such proceeding is based if the case under title 11 had not been commenced.

"(d) A trustee may commence a proceeding arising under title 11 or arising in or related to a case under title 11 based on a claim arising after the commencement of such case from the operation of the business of the debtor only in the bankruptcy court for the district where a State or Federal court sits in which, under applicable nonbankruptcy venue provisions, an action on such claim may have been brought.

"(e) A proceeding arising under title 11 or arising in or related to a case under title 11, based on a claim arising after the commencement of such case from the operation of the business of the debtor, may be commenced against the representative of the estate in such case in the bankruptcy court for the district where the State or Federal court sits in which the party commencing such proceeding may, under applicable nonbankruptcy venue provisions, have brought an action on such claim, or in the bankruptcy court in which such case is pending.

"§1474. Venue of cases ancillary to foreign proceedings

"(a) A case under section 304 of title 11 to enjoin the commencement or continuation of an action or proceeding in a State or Federal court, or the enforcement of a judgment, may be commenced only in the bankruptcy court for the district where the State or Federal court sits in which is pending the action or proceeding against which the injunction is sought.

"(b) A case under section 304 of title 11 to enjoin the enforcement of a lien against property, or to require turnover of property of an estate, may be commenced only in the bankruptcy court for the district in which such property is found.

"(c) A case under section 304 of title 11, other than a case specified in subsection (a) or (b) of this section, may be commenced only in the bankruptcy court for the district in which is located the principal place of business in the United States, or the principal assets in the United States, of the estate that is the subject of such case.

"§1475. Change of venue

"A bankruptcy court may transfer a case under title 11 or a proceeding arising in or related to such case to a bankruptcy court for another district, in the interest of justice and for the convenience of the parties.

"§1476. Creation or alteration of district or division

"Cases or proceedings pending at the time of the creation of a new district or division or transfer of a county or territory from one division or district to another may be tried in the district or division as it existed at the institution of the case or proceeding, or in the district or division so created or to which the county or territory is so transferred as the parties shall agree or the court direct.

"§1477. Cure or waiver of defects

"(a) The bankruptcy court of a district in which is filed a case or proceeding laying venue in the wrong division or district may, in the interest of justice and for the convenience of the parties, retain such case or proceeding, or may transfer, under section 1475 of this title, such case or proceeding to any other district or division.

"(b) Nothing in this chapter shall impair the jurisdiction of a bankruptcy court of any matter involving a party who does not interpose timely and sufficient objection to the venue.

"§1478. Removal to the bankruptcy courts

"(a) A party may remove any claim or cause of action in a civil action, other than a proceeding before the United States Tax Court or civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the bankruptcy court for the district where such civil action is pending, if the bankruptcy courts have jurisdiction over such claim or cause of action.

"(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order under this subsection remanding a claim or cause of action is not reviewable by appeal or other wise.

"§1479. Provisional remedies; security

"(a) Whenever any action is removed to a bankruptcy court under section 1478 of this title, any attachment or sequestration of the goods or estate of the defendant in such action shall hold the goods or estate to answer the final judgment or decree in the same manner as they would have been held to answer final judgment or decree had it been rendered by the court from which the action was removed, unless the attachment or sequestration is invalidated under applicable law.

"(b) Any bond, undertaking, or security given by any party in an action prior to removal under section 1478 of this title shall remain valid and effectual notwithstanding such removal, unless such bond, undertaking, or other security is invalidated under applicable law.

"(c) All injunctions, orders, and other proceedings in an action prior to removal of such action under section 1478 of this title shall remain in full force and effect until dissolved or modified by the bankruptcy court.

"§1480. Jury trials

"(a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury, in a case under title 11 or in a proceeding arising under title 11 or arising in or related to a case under title 11, that is provided by any statute in effect on September 30, 1979.

"(b) The bankruptcy court may order the issues arising under section 303 of title 11 to be tried without a jury.

"§1481. Powers of bankruptcy court

"A bankruptcy court shall have the powers of a court of equity, law, and admiralty.

"§1482. Appeals

"(a) Bankruptcy appellate panels established in section 159(a) of this title shall have jurisdiction of appeals from all final judgments, orders, and decrees of bankruptcy courts.

"(b) Bankruptcy appellate panels shall have jurisdiction of appeals from interlocutory judgments, orders, and decrees of bankruptcy courts, but only by leave of the panel to which the appeal is taken.".

(b) The table of chapters of part IV of title 28 of the United States Code is amended by inserting after the item relating to chapter 89 the following new item:

"90. Bankruptcy Courts.............................. 1471.".

SEC. 234. Section 1656 of title 28, United States Code, is amended by inserting "or in a bankruptcy court" after "a district court".

SEC. 235. Section 1827(i) of title 28, United States Code, is amended by striking out "referee in bankruptcy" and inserting in lieu thereof "bankruptcy judge".

SEC. 236. Section 1869(f) of title 28, United States Code, is amended by inserting "chapter 6 of title 28, United States Code," after "chapter 5 of title 28, United States Code,".

SEC. 237. Section 1962 of title 28, United States Code, is amended by inserting "or bankruptcy court" after "district court".

SEC. 238. Section 1963 of title 28, United States Code, is amended--

(1) in the first paragraph by inserting "or bankruptcy court" after "district court" the first place it appears,

(2) in the first sentence of the first paragraph by inserting "with the clerk of the district court or the bankruptcy court, whichever is appropriate" before the period at the end thereof, and

(3) by adding at the end thereof the following new undesignated paragraph:

"An order of discharge or an order of confirmation in a case under title 11 which has become final may be registered in any other district by filing in the office of the clerk of the bankruptcy court of that other district a certified copy of the order and when so registered shall have the same effect as an order of the bankruptcy court of the district where so registered and may be enforced in like manner.".

SEC. 239. Section 2107 of title 28, United States Code, is amended--

(1) by inserting "or the bankruptcy court" after "district court", and

(2) by striking out the last paragraph.

SEC. 240. Section 2109 of title 28, United States Code, is amended by inserting "or from a bankruptcy court" after "from a district court".

SEC. 241. (a) Chapter 153 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§2256. Habeas corpus from bankruptcy courts

"A bankruptcy court may issue a writ of habeas corpus--

"(1) when appropriate to bring a person before the court--

"(A) for examination;

"(B) to testify; or

"(C) to perform a duty imposed on such person under this title or title 11; or

"(2) ordering the release of a debtor in a case under title 11 in custody under the judgment of a Federal or State court if--

"(A) such debtor was arrested or imprisoned on process in any civil action;

"(B) such process was issued for the collection of a debt--

"(i) that is dischargeable under title 11; or

"(ii) that is or will be provided for in a plan under chapter 11 or 13 of title 11; and

"(C) before the issuance of such writ, notice and a hearing have been afforded the adverse party of such debtor in custody to contest the issuance of such writ.".

(b) The table of sections for chapter 153 of title 28, United States Code, is amended by adding at the end thereof the following new item:

"2256. Habeas corpus from bankruptcy courts.".

SEC. 242. Rule 1101(a) of the Federal Rules of Evidence is amended by inserting "the United States bankruptcy courts," after "the United States district courts,".

SEC. 243. (a) Section 8331(22) of title 5, United States Code, is amended--

(1) in subparagraph (A)--

(A) by striking out "March 31, 1984, and that has agreed" and inserting in lieu thereof "on the date of enactment of the Bankruptcy Court Act of 1982, and thereafter agrees" and

(B) by striking out "under section 201 of this Act" and inserting in lieu thereof "under section 151 of title 28, United States Code,", and

(2) in subparagraph (B) by striking out "the transition period" and inserting in lieu thereof "between October 1, 1979, and September 30, 1985, inclusive,".

(b) Subsections (f), (i), (j), (k), (l), and (m) of section 8339, subsections (b)(1) and (d) of section 8341, and section 8344(a)(A) of title 5, United States Code, are each amended by striking out "and (o)" and inserting in lieu thereof "and (n)".

SEC. 244. Section 2(a) of the Act of November 8, 1977 (Public Law 95-157; 91 Stat. 1266), is amended by inserting "and a bankruptcy court" after "district court".

SEC. 245. (a) Section 402(b) of the Act of November 6, 1978 (Public Law 95-598; 92 Stat. 4682), is amended by striking out "shall take effect on April 1, 1984" and inserting in lieu thereof "shall not take effect".

(b) Section 402(e) of the Act of November 6, 1978 (Public Law 95-598; 92 Stat. 2682) is amended by striking out "April 1, 1984" and inserting in lieu thereof "the date of enactment of the Bankruptcy Court Act of 1982".

SEC. 246. (a) Section 406(a) of the Act of November 6, 1978 (Public Law 95-598; 92 Stat. 2686), is amended--

(1) by striking out paragraph (2), and

(2) in paragraph (1)--

(A) by striking out "(1)",

(B) by striking out "During the transition period, the" and inserting in lieu thereof "The"..

(C) in subparagraph (A)--

(i) by striking out "(A)" and inserting in lieu thereof "(1)", and

(ii) by striking out "section 201 of this Act" and inserting in lieu thereof "section 151 of title 28, United States Code,", and

(D) in subparagraph (B) by striking out "(B)" and inserting in lieu thereof "(2)".

(b) Section 406(b) of the Act of November 6, 1978 (Public Law 95-598; 92 Stat. 2686), is amended by striking out "section 201 of this Act" and inserting in lieu thereof "section 151 of title 28, United States Code,".

SEC. 247. Sections 404, 405(a), 405(b), 405(c), 407(c), 409, and 410 of the Act of November 6, 1978 (Public Law 95-598; 92 Stat. 2683) are repealed.

SEC. 248. (a) In addition to the court created by section 202 of this Act, the offices of bankruptcy judges for which appointments are authorized by laws in effect immediately preceding the date of enactment of this Act, to be made in a judicial district, and the bankruptcy judges holding those offices, shall constitute the bankruptcy court of such judicial district during the period beginning on the date of enactment of this Act and ending in such judicial district on the date all appointments under section 152 of title 28, United States Code, to the United States bankruptcy court for such district have been made or September 30, 1985, whichever is earlier (hereinafter in this Act referred to as the "transition period").

(b) The offices of bankruptcy judges established as bankruptcy courts in subsection (a) shall be deemed to be the bankruptcy courts for purposes of--

(1) this Act,

(2) the Acts amended by this Act,

(3) title 28 of the United States Code, as amended by this Act, other than sections 152, 293(b), 294, 295, 331, 372, and 451 of such title,

(4) title 11 of the United States Code, and

(5) the Acts amended by the Act of November 6, 1978 (Public Law 95-598; 92 Stat. 2549).

(c) During the transition period and in addition to cases and proceedings commenced during such period, all cases under title 11 of the United States Code and all proceedings arising under title 11 of the United States Code or arising in or related to a case under title 11 of the United States Code pending on the date of enactment of this Act shall be heard by the bankruptcy courts specified in subsection (a) as though such cases and proceedings had been commenced in such courts.

SEC. 249. (a) Judges of the bankruptcy courts established in section 248(a) of this Act shall have the title United States bankruptcy judges.

(b) During the transition period United States bankruptcy judges may exercise the jurisdiction and powers conferred by title 28 and title 11 of the United States Code on bankruptcy courts.

(c) Notwithstanding sections 152 and 153 of title 28, United States Code, as enacted by this Act, section 34a of the Bankruptcy Act in effect on September 30, 1979, and section 404(b) of the Act of November 6, 1978, as in effect before the date of enactment of this Act, except for vacancies in office resulting from death, resignation or retirement, the term of office of a United States bankruptcy judge who is serving on the date of enactment of this Act in a bankruptcy court established in section 248(a) of this Act, shall expire--

(1) on March 31, 1983, if such judge first entered on duty after December 31, 1975;

(2) on March 31, 1984, if such judge first entered on duty after December 31, 1967 and before January 1, 1976; or

(3) on March 31, 1985, if such judge first entered on duty before January 1, 1968;

provided; however, any such judge whose term has expired may continue in office and may exercise the jurisdiction and powers conferred by title 28 and title 11 of the United States Code on the bankruptcy courts until such judge's successor takes office or until September 30, 1985, whichever is earlier.

(d) Notwithstanding section 154 of title 28, United States Code, during the transition period the levels of salaries of United States bankruptcy judges holding office on the date of enactment of this Act are continued at the levels in effect on the date of the enactment of this Act, subject to adjustment under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361) and section 461 of title 28, United States Code.

(e)(1) During the transition period an appeal from a judgment, order, or decree of a United States bankruptcy judge shall be--

(A) if the judicial council of the circuit in which the bankruptcy judge sits so orders for the district in which the bankruptcy judge sits, to a panel of three bankruptcy judges appointed in the manner described in section 159 of title 28, United States Code, as added by section 202 of this Act,

(B) if the parties to the appeal agree to a direct appeal to the court of appeals for such circuit, to such court of appeals, or

(C) if no panel is appointed under subparagraph (A) for the district in which such bankruptcy judge sits, to the district court for such district.

(2) During the transition period the district courts of the United States shall have jurisdiction to hear appeals from the judgments, orders, and decrees of bankruptcy courts.

(3) During the transition period a panel referred to in paragraph (1)(A) shall be deemed to be a bankruptcy appellate panel referred to in section 1293(b) of title 28, United States Code.

SEC. 250. (a) On October 1, 1985, there shall be transferred to the appropriate United States bankruptcy court established in section 151(a) of title 28, United States Code--

(1) cases, and matters and proceedings in cases, under the Bankruptcy Act that are pending, at the end of September 30, 1985, in the bankruptcy courts established in section 248(a) of this Act, other than cases, and matters and proceedings in cases under--

(A) section 77 or chapter IX of the Bankruptcy Act, or

(B) chapter X of the Bankruptcy Act in which a general reference under section 117 of the Bankruptcy Act is not in effect, and

(2) cases under title 11 of the United States Code, and proceedings arising under title 11 of the United States Code or arising in or related to cases under title 11 of the United States Code, that are pending at the end of September 30, 1985, in the bankruptcy courts established in section 248(a) of this Act.

(b) On October 1, 1985, there shall be transferred to the appropriate bankruptcy appellate panels established in section 159 of title 28, United States Code, appeals from final judgments, orders, and decrees of the bankruptcy courts established in section 248(a) pending at the end of September 30, 1985, in the panels appointed under section 49(e)(1)(A).

SEC. 251. The Supreme Court may issue such additional rules of procedure, consistent with Acts of Congress, as may be necessary for the orderly transfer of functions and records and the orderly transition to the new bankruptcy court system created by this Act.

SEC. 252. (a) Whenever a vacancy occurs in a bankruptcy court of the United States, the President shall nominate as a bankruptcy judge to fill that vacancy a person whose character, experience, ability, and impartiality qualify such person to serve in the Federal judiciary.

(b) The Attorney General of the United States shall assist the President by evaluating potential nominees and by recommending to the President for consideration for appointment persons who are qualified to be bankruptcy judges.

(c) Before transmitting to the President the names of the persons he deems best qualified to fill any existing vacancy, the Attorney General shall have determined that--

(1) public notice of such vacancy has been given and an affirmative effort has been made, in the case of each such vacancy, to identify qualified candidates, without discrimination as to race, color, sex, religion, or natural origin,

(2) such persons are members in good standing of at least one State bar, or the District of Columbia bar, and members in good standing of every other bar of which they may be members,

(3) such persons possess, and have a reputation for, integrity and good character,

(4) such persons are of sound physical and mental health,

(5) such persons possess and have demonstrated commitment to equal justice under law,

(6) such persons possess and have demonstrated outstanding legal ability and competence, as evidenced by substantial legal experience, ability to deal with complex legal problems, aptitude for legal scholarship and writing, and familiarity with courts and court processes, and

(7) such persons' demeanor, character, and personality indicate that they would exhibit judicial temperament if appointed to the position of United States bankruptcy judge.

SEC. 253. The amendments made by this Act shall take effect on the date of the enactment of this Act.

On the facts of this record, I can see no basis for saying that petitioner was denied due process, Betts v. Brady, supra, and accordingly would affirm the judgment.

---

363 U.S. 555

METLAKATLA INDIAN COMMUNITY ANNETTE ISLAND RESERVE, Appellant,

v.

EGAN, Governor of Alaska, et al.

ORGANIZED VILLAGE OF KAKE et al., Appellants,

v.

EGAN, Governor of Alaska.

Nos. 326, 327.

Argued May 18, 1960.

Decided June 20, 1960.

Actions for permanent injunction against state enforcement of Alaskan statute prohibiting fishing with traps. The interim District Court for Alaska denied injunction, dismissed complaints, and denied an injunction pending appeal, but an injunction pending appeal was granted by a Justice of the Supreme Court, acting in his capacity as Circuit Justice. The plaintiffs having appealed, the Supreme Court, Mr. Justice Frankfurter, held that, while the Supreme Court had jurisdiction, where constitutionality of statute might depend on its construction by state court, and enlightenment drawn on spot by state court might be material to ultimate determination of federal questions, and authoritative pronouncement by state court with regard to justification of legislation would have bearing, Supreme Court refrained from deciding merits of appeal involving issue whether statute conflicted with applicable federal law, so as to afford Alaska Supreme Court the opportunity to rule on questions open to it for decision.

Cases held on docket with directions.

Mr. Chief Justice Warren, Mr. Justice Black and Mr. Justice Douglas dissented in part.

1. Courts ⟹392

An appeal from the highest court of a state in which a decision may be had is within jurisdiction of Supreme Court if state court sustains a state statute against a claim of unconstitutionality under the federal Constitution, as when it sustains a statute against a contention that it is in conflict with applicable federal law. 28 U.S.C.A. § 1257(2).

2. Courts ⟹42(1)

Interim Alaska District Court was not intended by Statehood Act to be the newly created United States District Court for the District of Alaska. Alaska Statehood Act, §§ 12–18, 48 U.S.C.A. preceding section 23; 28 U.S.C.A. § 81A.

3. Courts ⟹392

Where Alaskan Legislature vested state judicial power in interim District Court for time being, and district judge deemed himself to be exercising such power, and did so with consent of United States, interim District Court sat as a "court of a State", for purpose of statute determining appellate jurisdiction of federal Supreme Court. 28 U.S.C.A. § 1257(2); Alaska Statehood Act, §§ 12–18, 48 U.S.C.A. preceding section 23; Laws Alaska 1959, c. 50, §§ 31(2), 32(4) as amended by Laws Alaska 1959, c. 151; Const.Alaska, art. 4, §§ 1, 2; art. 15, §§ 17, 25.

See publication Words and Phrases, for other judicial constructions and definitions of "Court of a State".

4. Courts ⟹392

Statute relating to appellate jurisdiction of Supreme Court was intended to allow substantial constitutional questions to be timely brought to Supreme Court. 28 U.S.C.A. § 1257.

5. Courts ⇨392

To insure timely appeal on constitutional question, where date for full organization of Alaskan courts was 2½ years in future, interim District Court was considered the highest court of Alaska, for purpose of appellate jurisdiction of federal Supreme Court, even though, before action was commenced, contingency had occurred conferring appellate jurisdiction on Alaska Supreme Court, and thereafter judges had been appointed and rules adopted. 28 U.S.C.A. § 1257(2); Alaska Statehood Act, §§ 12–18, 48 U.S.C.A. preceding section 23; Laws Alaska 1959, c. 50, §§ 31(2), 32(4) as amended by Laws Alaska 1959, c. 151, § 1; c. 50, § 32(3); Const.Alaska, art. 4, §§ 1, 2; art. 15, §§ 17, 25.

6. Courts ⇨399(1)

Where constitutionality of state statute might depend on its construction by state court, and enlightenment drawn on spot by state court might be material to ultimate determination of federal questions, and authoritative pronouncement by state court with regard to justification of legislation would have bearing, Supreme Court refrained from deciding merits of appeal involving issue whether Alaskan statute conflicted with applicable federal law, so as to afford Alaska Supreme Court the opportunity to rule on questions open to it for decision. Laws Alaska 1959, c. 17 as amended by Laws Alaska 1959, c. 95, § 1; 48 U.S.C.A. §§ 221, 222; U.S.C.A.Const. art. 1, § 8; art. 6, cl. 2.

7. Courts ⇨400

Where it was claimed that Alaskan statute conflicted with applicable federal law, and irreparable injury might flow from enforcement of Alaskan criminal statute prohibiting fishing with traps, Supreme Court, which refrained from deciding issues presented to it pending a decision by the Alaskan Supreme Court, continued a previously-granted injunction against enforcement of statute pending final disposition. Laws Alaska 1959, c. 17 as amended by Laws Alaska 1959, c. 95.

◆

556

Mr. Richard Schifter, Washington, D. C., for appellant in No. 326.

Mr. John W. Cragun, Washington, D. C., for appellants in No. 327.

Mr. John D. Calhoun, New York City, for the United States, as amicus curiae, by special leave of Court, in both cases.

Mr. John L. Rader, Anchorage, Alaska, for appellees in both cases.

Mr. Justice FRANKFURTER delivered the opinion of the Court.

These consolidated cases were commenced on June 22 and 24, 1959, in the interim District Court for Alaska, by complaints seeking permanent injunctions against threatened enforcement by the new State of Alaska, its Governor, and other agents, of an Alaska statute (Alaska Laws 1959, c. 17, as amended, Alaska Laws 1959, c. 95) making it a criminal offense to fish with traps. The statute was assailed on the ground that it was in conflict with applicable federal law. On July 2, 1959, orders were entered denying the injunctions, dismissing the complaints with prejudice, and denying an injunction pending appeal to this Court. 174 F.Supp. 500. On July 11, 1959, Mr. Justice Brennan, acting in his capacity as a circuit justice, granted appellants' application for an injunction pending final disposition of their future appeals to this Court. His opinion noted the existence of substantial questions, both as to our jurisdiction and the merits. 80 S.Ct. 33, 4 L.Ed.2d 34. The notices of appeal were filed 557 on August 6, 1959; on December 7, 1959, we postponed further consideration of the question of jurisdiction to the hearing of the cases on the merits. 361 U.S. 911, 80 S.Ct. 254, 4 L.Ed.2d 181.

[1] If the orders rendered on July 2, 1959, were those of the "highest court of a State in which a decision could be had," the appeals are within our jurisdiction under 28 U.S.C. § 1257(2), 28 U.S.C.A. § 1257(2), since the court below sustained a statute of the State of Alaska against a claim of unconstitutionality under the United States Constitution. The jurisdictional problem arises out of the enactments governing Alaska's accession to statehood, specifically, in relation to the Constitution of the new State and to the state and federal laws governing the termination of the former territorial courts and their displacement by a new state judicial system and a Federal District Court for the District of Alaska. The State Constitution, which took effect "immediately upon the admission of Alaska into the Union as a state" (Art. XV, § 25) on January 3, 1959, provided for a Supreme Court, to "be the highest court of the State, with final appellate jurisdiction," a superior court, and such other courts as the legislature may provide. Art. IV, §§ 1, 2. Article XV, § 17, provides that in the transitional period until the new courts are organized, "the judicial system shall remain as constituted on the date of admission * * *" and that "[w]hen the state courts are organized, new actions shall be commenced and filed therein, and all causes, other than those under the jurisdiction of the United States, pending in the courts existing on the date of admission, shall be transferred to the proper state court as though commenced, filed, or lodged in those courts in the first instance, except as otherwise provided by law."

The Alaska Statehood Act, 72 Stat. 339, which also became fully effective on January 3, 1959, in §§ 13–17, 48 U.S.C.A. preceding section 23, makes similar provision for the eventual disposition of business pending in the territorial district court upon the 558 organization of the new District Court for the District of Alaska. However, it too provides, in § 18, that "the United States District Court for the Territory of Alaska shall continue to function as heretofore" for three years, or until the President proclaims that the new District Court "is prepared to assume the functions imposed upon it." In June, 1959, when these actions were commenced, and on July 2, 1959, when decision below was rendered, neither new federal nor state courts were in operation.

[2] The first question presented is whether the interim Alaskan District Court was the "court of a State" in deciding these cases. Sections 12 to 18 of the Statehood Act, 72 Stat. 339, make it plain that the interim court was not intended to be the newly created United States District Court for the District of Alaska, 28 U.S.C. § 81A, 28 U.S.C.A. § 81A; otherwise the nature of the court, whether state or federal, is not explicitly set forth. It is apparent, however, that the court is to a significant degree the creature of two sovereigns acting cooperatively to accomplish the joint purpose of avoiding an interregnum in judicial administration in the transitional period. The termination of the existence of the interim court is governed by federal law, Statehood Act § 18; but the termination of its general jurisdiction over state law matters, insofar as it is dependent on state consent, is governed by state law, Alaska Laws 1959, c. 50, § 31(2), which also provides for the accelerated organization of separate Alaska courts should the interim court be terminated before they are ready. Alaska Laws 1959, c. 50, § 32(4), amended by Alaska Laws 1959, c. 151, § 1.

[3] To determine our jurisdiction we need not engage in abstract speculation as to the function of the interim court in cases not before us. Whether the court can serve as a federal court, and the permissible scope of its powers if it may so serve, cf. National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 69 S.Ct. 1173, 93 L.Ed. 1556; Benner v. Porter, 559 9 How. 235, 13 L.Ed. 119,

are perplexing questions, decision of which should not be avoidably made. It is apparent that the legislature of Alaska vested the judicial power of the State in the interim District Court for the time being, that the district judge in this case explicitly deemed himself to be exercising such power, and that, in light of the express consent of the United States, he properly did so. Benner v. Porter, supra. It follows that the District Court sat as a "court of a State" to decide these cases.

The question remains whether the interim court was also the "highest court" of Alaska within the meaning of 28 U.S.C. § 1257, 28 U.S.C.A. § 1257. At the time of the filing of the notice of this appeal on August 6, 1959, the latest time at which jurisdiction could properly be determined, no new Alaska state court was in actual operation, although on July 29 the Justices of the Court were designated by the Governor. The contention that the interim court was not the highest court of Alaska at that time rests upon this latter fact, and the terms of Alaska Laws 1959, c. 151, § 1, amending Alaska Laws 1959, c. 50, § 32, which amendment provides that in the event that "a court of competent jurisdiction, by final judgment, declares that the United States Court of Appeals for the Ninth Circuit lacks jurisdiction to hear appeals from the District Court of the District of Alaska, the Judicial Council shall forthwith meet and submit to the Governor the names of the persons nominated as justices of the supreme court and appeals from the District Court of the District of Alaska may be made to the State Supreme Court."

Because the Ninth Circuit had ruled against its appellate jurisdiction over the interim court on June 16, 1959, six days before this action was commenced, Parker v. McCarrey, 268 F.2d 907, it is urged that this provision, preserving appeals from the District Court to the Supreme Court of the State until the creation of that court, requires the conclusion that at least after July 29, when the Justices 560 were appointed, appellate review was sufficiently guaranteed to make the Supreme Court, and not the District Court, the highest court of Alaska in which a decision in the instant case could be rendered.

[4, 5] The question thus raised is not free from doubt. Viewing the cases as of August 6, when the notices of appeal were filed, it is fairly arguable that the preservation effected by Alaska Laws 1959, c. 151, § 1, of the right to appeal to the Supreme Court of Alaska constituted the interim court as a lower court of Alaska within the intent of 28 U.S.C. § 1257, 28 U.S.C.A. § 1257, to await the completion of the State's adjudicatory process as a prerequisite to adjudication here. Yet, were the promise of an appeal, however indefinitely postponed, to be taken as sufficient to bar our jurisdiction under § 1257, its equally obvious purpose to allow substantial constitutional questions to be timely brought here as of right would be frustrated. Although these cases were decided below on July 2, 1959, the date set by Alaska statute for full organization of the state courts was not until January 3, 1962, Alaska Laws 1959, c. 50, §§ 31 and 32(4). If no other fact were present, a potential delay of two and one-half years before the organization of a court to hear the preserved appeal would in itself counsel a construction against denial of our jurisdiction. Here, however, two additional facts must be weighed: (1) the Justices of the Supreme Court were actually appointed on July 29, in pursuance of a direction to accelerate the organization of the court; and (2) the effective promulgation of the rules of the court (accomplished on October 5, 1959) and appointment of a clerk were in their hands. Alaska Laws 1959, c. 50, § 32(3). While in light of these facts the question is exceedingly nice, we do not think that the assurance of a timely appeal to a court not yet functioning was sufficiently definite when the appeals were here filed to

constitute a bar to our jurisdiction under § 1257(2).

561

The interim court sustained the validity of the Alaska statute banning fishing with traps, Alaska Laws 1959, c. 17, as amended by Alaska Laws 1959, c. 95, against the claim of overriding federal law under the Supremacy Clause, Const. art. 6, cl. 2. The claim was based on an asserted conflict between the statute and regulations of the Secretary of the Interior, 24 Fed.Reg. 2053–71, prohibiting trap fishing in Alaskan waters generally, but excepting the appellants, thereby granting them in effect a license to fish with traps. The authority under which the Secretary purported to act is the Act of 1924, 43 Stat. 464, as amended 48 U.S.C. §§ 221, 222, 48 U.S.C.A. §§ 221, 222.

A question not free from doubt, to put it at its lowest, thus raised under the Supremacy Clause, is however entangled with questions of construction of Alaskan state statutes as well as of the Alaska Statehood Act, supra. Also in issue is the effect of provisions of a compact between Alaska and the United States which, it is urged, reserved exclusive regulatory powers over Indian fishing rights to the United States, 72 Stat. 339, and which, so construed, is assertedly unconstitutional because of its failure to accord to Alaska participation in the Union on an "equal footing" with the other States. The latter contention raises related questions of federal power under the Commerce Clause, Art. 1, § 8. While we have before us questions of federal law that are the concern of this Court, their consideration implicates antecedent questions of local law turning in part on appreciation of local economic and social considerations pertinent to the scope of the so-called police power reserved to the State, upon which it would be patently desirable to have the enlightenment which the now fully formed Alaska Supreme Court presumably could furnish. The original Act prohibiting traps was amended by Alaska Laws 1959, c. 95, § 1, so as to provide that it should not be construed inconsistently with the compact, and if 562 the Alaska court determines as a matter of statutory construction that the compact was designed to leave with the United States, as to Indian fishing, the power it exercises under the White Act, a constitutional question now appearing on the horizon might disappear. Moreover, since questions are raised regarding the status of these two Indian communities in relation to the authority of the Secretary of the Interior, enlightenment drawn on the spot by the Alaska Supreme Court may be material to any ultimate determination of federal questions by this Court. Finally, since the ultimate challenge to this legislation is that it must yield to superior federal authority, an authoritative pronouncement by the Supreme Court of Alaska with regard to the justifications of this legislation under the so-called police power would have important bearing on the question of the scope of the powers reserved to the State.

[6] Accordingly, consistently with the policies embodied in § 1257, and in view of the peculiar facts of these cases, we refrain at this stage from deciding the issues presented on the merits of these appeals so as to afford the Alaska Supreme Court the opportunity to rule on questions open to it for decision. We assume that that court has jurisdiction in these cases. However, since it alone can authoritatively decide such a question, we shall hold the cases on our docket. After the Alaska Supreme Court's decision, there may be further proceedings on these appeals; and if it assumes jurisdiction, further appeals may be taken from its judgments. Cf. Lassiter v. Northampton County Board of Elections, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072.

[7] Because of the nature of the asserted claim of federal right and the

irreparable nature of the injury which may flow from the enforcement of these Alaska criminal statutes prior to a final determination of the merits, we continue the stays granted by Mr. Justice Brennan on July 11, 1959, until the final disposition of the cases.

563

Having been advised that appeals in these cases are pending in the Alaska Supreme Court, we direct appellants to pursue those appeals for disposition not inconsistent with this opinion.

It is so ordered.

Cases held on docket with directions.

THE CHIEF JUSTICE, Mr. Justice BLACK and Mr. Justice DOUGLAS dissent from remitting the parties to the Alaska Supreme Court, as they are of the view that the controlling questions are federal ones whose resolution is for this Court.

Senator DOLE. Thank you very much. We appreciate your testimony very much.

The hearing is now adjourned.

[Whereupon, at 11:45 a.m., the subcommittee was adjourned, subject to the call of the Chair.]

APPENDIX

Additional Submissions for the Record

Law Offices

GARVEY, SCHUBERT, ADAMS & BARER

1000 POTOMAC STREET, N.W
WASHINGTON, D.C. 20007

202 965 7880

SEATTLE OFFICE

30TH FLOOR
THE BANK OF CALIFORNIA CENTER
SEATTLE, WASHINGTON 98164
(206) 464-3939
TELEX 32-1037
CABLE: LEX SEATTLE

BROCK ADAMS*
BILL ALBERGER**
JOHN R. ALLISON*
SHARON STEWART ARMSTRONG
STANLEY H. BARER*
JAMES A. BEALL****
BOBBE JEAN BRIDGE
M. JOHN BUNDY
ALAN A. BUTCHMAN**
JOSEPH H. DETTMAR***
JONATHAN A. EDDY
DAVID L. FRIEND
MICHAEL D. GARVEY*
PETER R. GILBERT**
STUART P. HENNESSEY
JOHN K. HOERSTER
BARBARA L. HOLLAND
D. DOUGLAS HOPKINS
STEPHEN B. JOHNSON*
DIANE J. KERO
JAMES G. KIBBLE
THOMAS M. KILBANE, JR.
BRIAN A. MORRISON
JAMES R. OFFUTT**

A. DANIEL O'NEAL*
KERRY E. RADCLIFFE
BRUCE A. ROBERTSON
E. CHARLES ROUTH
KENNETH L. SCHUBERT, JR.*
MARY A. SHEEHAN**
ALAN P. SHERBROOKE
JOHN M. STEEL
GARY J. STRAUSS
DONALD P. SWISHER

* Washington State and District of Columbia Bars
** District of Columbia Bar
*** Virginia Bar
**** Oregon State and District of Columbia Bars
All others Washington State Bar

Please reply to Washington, D.C. Office

November 8, 1982

The Honorable Robert J. Dole
Chairman, Subcommittee on Courts
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

We are submitting the following comments in connection with the Subcommittee's hearings on pending bankruptcy amendments and court reform. Our comments are on behalf of our client, Commercial Union Insurance Company, and we ask that they be made part of the record.

We appreciate the opportunity to present our views concerning the problem that occurs when a major defendant in a multi-defendant product liability case files a petition for reorganization under Chapter 11 of the Bankruptcy Reform Act. The problem arises due to the fact that the jurisdictional statute, Section 1471 of Title 28, United States Code, does not vest exclusive jurisdiction over automatic stay issues in the federal court where the Chapter 11 proceedings are pending. Therefore, state and federal courts across the country are left to decide, often in a widely divergent manner, whether, and to what extent, the automatic stay provisions of the Bankruptcy Reform Act (11 U.S.C. § 362(a)) operate to stay further proceedings against codefendants of the Chapter 11 petitioner.

Although the problem can arise in any product liability litigation, perhaps the most dramatic illustration of the chaos that can occur is the situation that exists in the thousands of asbestos cases throughout the country caused by the Chapter 11 petition filed by Manville and its affiliates.

At the present time, asbestos-related lawsuits involving approximately 16,500 plaintiffs are pending in various state and federal courts against Manville and several other manufacturers and distributors of asbestos insulation products. Because so many courts are involved, the parties are being forced to litigate over and over again the identical issue of whether the Manville Chapter 11 petition stays the litigation against the remaining defendants. A few examples of the divergent opinions issued by the courts are set forth in Exhibit A to our statement. Some courts have stayed the litigation as to all defendants pursuant to Section 362 of Title 11. Other courts have stayed the litigation as to all defendants pursuant to case law. Still other courts have granted temporary stays on the basis of equitable or practical considerations. And some courts have refused to stay the litigation against defendants who have not yet filed a Chapter 11 petition.

Our experience in the State of Washington, where approximately 500 of these cases are pending, illustrates the chaos and confusion which result. In King County Superior Court, approximately 300 cases have been stayed indefinitely. In Kitsap County Superior Court, approximately 100 cases have been stayed for six months. In Pierce County Superior Court, one case was not stayed. In the U.S. District Court in Tacoma, approximately 24 cases were not stayed. And, as of November 5, 1982, the U.S. District Court in Seattle has not yet ruled on the issue with respect to approximately 60 cases pending in that court.

The necessity of litigating the same automatic stay issue in the numerous trial and appellate courts where these cases are pending is burdening the litigants and the judicial system with substantial duplicative costs. Attorneys' fees and judicial time are being needlessly wasted, and chaos and confusion are resulting from the wide divergence of judicial decisions.

Unless something is done, the future will be even more bleak. The trial courts' rulings on the stay will create an appealable issue in nearly every case. In addition, appeals will also result from evidentiary rulings on such matters as whether deposition testimony obtained in a case that is not stayed can later be used against the same party in a case that was stayed when the testimony was given. The costs of multiple appeals on these issues will be substantial.

To address these problems, we have proposed a technical amendment to Section 1471 of Title 28, United States Code. A copy of the proposed amendment is attached as Exhibit B to our statement. The proposal would simply give a single court -- an Article III judge where the Chapter 11 proceeding is pending -- exclusive jurisdiction to decide questions relating to the automatic stay as to codefendants of the Chapter 11 petitioner. In the Manville situation, for example, all automatic stay issues would be decided in the Southern District of New York, with a single right of appeal to the U.S. Court of Appeals for the Second Circuit. Our proposal would not determine how the automatic stay issues would be decided in those courts. Those courts would decide the issues on the basis of the facts, equities, and practical considerations relating to the Manville Chapter 11 proceedings.

We believe that our proposal, if enacted, will save litigants many thousands of dollars as well as conserve valuable judicial resources. It will also promote national uniformity on an issue arising under the federal bankruptcy laws. Finally, it will place the decision in the hands of the court where the Chapter 11 proceedings are pending, which will be in the best position to coordinate that decision with related issues, such as the viability of the Chapter 11 petition and the manner in which the plaintiffs' product liability claims against Manville will be adjudicated.

Thank you again for the opportunity to submit our views.

Sincerely yours,

GARVEY, SCHUBERT, ADAMS & BARER

By
Brock Adams

EXHIBIT A

DIVERGENT RESULTS

In multiparty litigation, state and federal courts across the country are reaching varied results concerning the scope of the automatic stay, and concerning the proper court to decide the issue.

a. Some courts have relied on the language of the automatic stay provision, 11 U.S.C. § 362(a), and have concluded that the filing of a Chapter 11 bankruptcy petition by one defendant automatically stays proceedings against codefendants. E.g., Clutter v. Johns-Manville Sales Corp., Case No. C78-229 (N.D. Ohio Aug. 2, 1982); Nichols v. Johns-Manville Sales Corp., Case No. 81-2514 (D.C.D.C. Aug. 24, 1982); Austin v. Unarco Industries, Inc., Case No. 82-1168 (1st Cir. Aug. 5, 1982).

b. Other courts have concluded that a Chapter 11 petition by one defendant automatically stays proceedings against codefendants, if the potential liability of the codefendants is "inextricably interwoven" with that of the Chapter 11 petitioner. E.g., Federal Life Insurance Co. v. First Financial Group of Texas, Inc., 3 Bankr. Rptr. 375 (S.D. Tex. 1980); In re King County (Washington) Asbestos Cases (Sept. 3, 1980).

c. Other courts have decided that lawsuits against codefendants are automatically stayed, if the Chapter 11 petitioner is not merely a "nominal" defendant in the case. E.g., In re White Motor Credit Corporation, 11 Bankr. Rptr. 294 (N.D. Ohio 1981).

d. Other courts have stayed proceedings against codefendants as a matter of local judicial convenience, to give the bankruptcy court time to act. E.g., In re Kitsap County (Washington) Asbestos Cases (Sept. 7, 1982).

e. Other courts have granted a limited stay on equitable grounds.

f. Other courts have decided that the automatic stay applies only to the Chapter 11 petitioner, despite the language of 11 U.S.C. § 362(a). E.g., In re Related Asbestos Cases, No. C79-3588 (N.D. Cal. Sept. 15, 1982).

EXHIBIT B

PROPOSED AMENDMENT

An amendment to Section 1471 of Title 28, United States Code, inserting the following new subsection:

"(_____) Under subsection (a) of this section, the court in which a case under Title 11 is pending shall have original and exclusive jurisdiction to grant relief from the automatic stay provided under Section 362 of Title 11 with respect to entities other than the debtor who are parties to any judicial, administrative, or other proceeding to which the debtor is a party. A decision or order granting or denying such relief shall be deemed a final decision or order for purposes of appeal."

AMERICAN INSURANCE ASSOCIATION

1025 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 293-3010

November 10, 1982

The Honorable Robert J. Dole
2213 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Senate Subcommittee on Courts
Hearing on Manville Bankruptcy

Dear Senator Dole:

The American Insurance Association (AIA) is a trade association which represents 169 property and casualty insurance companies. A number of the AIA's member companies provided general liability insurance policies to the major manufacturers and suppliers of asbestos and asbestos products.

The AIA is currently reviewing the various legislative proposals designed to address the growing volume of asbestos litigation. An Association position has not been reached on the proposals which would integrate a solution to the asbestos products liability situation into bankruptcy reform legislation. The Association is examining statutory language which would give the bankruptcy court the authority to join non-Chapter 11 asbestos litigation co-defendants in any proceedings associated with asbestos manufacturers which have declared bankruptcy. Also under review is the Crum & Forster proposal to amend the Federal Bankruptcy Act to require the bankruptcy court to take jurisdiction over:

- all personal injury claims involving asbestos exposure pending against Manville and all co-defendants in Manville actions,
- all cross-claims between co-defendants, and
- all claims between the insurers of those defendants.

Under the proposal, the bankruptcy court would be required to marshall assets of all defendants to create a trust fund for payment of asbestos claims. The defendants would be insulated from asbestos claims as long as the trust fund lasts or until all claims are satisfied.

Disputes between insurers and between insurers and their policyholders have slowed the payment of asbestos claims. These disputes are the result of the long latency period associated with asbestos-related illnesses and the construction of insurance policy language intended to trigger coverage. Interpretation of key concepts such as "injury" and "occurrence" becomes extremely difficult in nontraumatic injury cases.

In responding to traumatic injuries, bodily injury is clearly evident. It is a simple matter for the insurer to determine when the event occurred. In cases involving asbestos-related disease, however, inhalation - the "occurrence" that causes the injury - takes place substantially before the manifestation of the ultimate injury - asbestosis, mesothelioma, or lung cancer. As a result, inhalation may continue through numerous insurance policy periods, the disease may develop during subsequent policy periods, and manifestation may occur in yet another policy period. Consequently, the issue of which insurer or insurers respond to the injury is extremely complicated.

Four distinct appellate court decisions[1] have required insurance companies to apply substantially identical contract language in different, inconsistent ways. Coverage theories which have been accepted by at least one federal circuit court of appeals are described below.

---

[1] Keene Corp. v. Insurance Co. of N. America, 513 F.Supp. 47 (D.D.C. 1981). Porter v. American Optical Corp., 641 F.2d 1128 (5th Cir. 1981). Insurance Co. of N. America v. Forty-Eight Insulations, 633 F.2d 1212 (6th Cir. 1980). Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co., 682 F.2d 12 (1982).

> "Manifestation theory": Those insurers on the risk at the time the asbestos-related disease first manifested itself by way of medically diagnosible symptoms must provide coverage.
>
> "Exposure theory": Those insurers on the risk at the time of the exposure to asbestos must indemnify the policyholder for a pro-rata share of its liability, the proportion to be determined by the ratio of the number of years the insurer was on the risk to the total number of years of exposure.
>
> "Triple trigger theory": Inhalation exposure, exposure in residence, and manifestation all trigger coverage under the available insurance policies. "Bodily injury" is defined to mean any part of the single injurious process that asbestos-related diseases entail.

The Supreme Court has twice refused to review the asbestos insurance coverage issue. Although it has never stated its reasons for denying certiorari, the Supreme Court appears to regard the dispute as one involving interpretation of contracts under state law and therefore not a Federal question for review. No final resolution of which coverage theory should apply has been reached.

Advancing tort theories have further complicated the payment of asbestos claims.[2] Borel v. Fireboard Paper Products Corporation represents a radical shift in legal doctrine in that it allowed asbestos workers to pursue tort actions against the suppliers of asbestos products. Asbestosis was previously regarded preeminently as an occupational disease and subject to the limitations of the workers' compensation award which does not include pain and suffering and all lost earnings. The Borel decision also held that an asbestos-product manufacturer can be held jointly and severally liable for asbestos-related disease as long as his product had some causal relationship to the development of the disease. A claimant who used a manufacturer's product for one year, an then used other manufacturers' asbestos-containing products for several years could recover damages from the initial manufacturer for his total loss.

The 1973 Borel decision applied new legal and medical concepts to the manufacturer whose workers were exposed to asbestos decades prior to the Court's decision, imposing on asbestos manufacturers and their insurers the impossible task of accumulating reserves to pay claims in compliance with a liability rule of which they could not have had any knowledge. This retroactive application of new legal doctrines has resulted in Manville's bankruptcy filing and intensified the dispute over which coverage theory should be applied universally.

The American Insurance Association is currently reviewing whether bankruptcy reform legislation is the proper vehicle for legislative solutions to the problems associated with asbestos-related injuries and the insurance coverage question. We welcome the Senate Subcommittee on Courts review of these issues and will transmit a formal Association position to the Subcommittee as soon as possible.

Respectfully submitted,

J. L. K.

James L. Kimble
Senior Counsel

---

[2] Richard A. Epstein. "Manville: The Bankruptcy of Product Liability Law," Regulation, Sept./Oct. 1982.

BARRY GOLDWATER
ARIZONA

United States Senate
WASHINGTON, D.C. 20510

COMMITTEES:
INTELLIGENCE, CHAIRMAN
ARMED SERVICES
TACTICAL WARFARE, CHAIRMAN
PREPAREDNESS
STRATEGIC AND THEATRE NUCLEAR FORCES
COMMERCE, SCIENCE, AND TRANSPORTATION
COMMUNICATIONS, CHAIRMAN
AVIATION
SCIENCE, TECHNOLOGY, AND SPACE
INDIAN AFFAIRS

November 22, 1982

Senator Robert Dole
Chairman, Subcommittee on Courts
Senate Judiciary Committee
Room 2204
Dirksen Senate Office Building
Washington, D. C. 20510

Dear Bob:

In connection with your hearings on S. 2000, the Bankruptcy Reform bill, I request that you give attention to the appeal by Virginia Fritz, Clerk of the Arizona District Bankruptcy Court, which I am enclosing with my letter.

Mrs. Fritz has prepared a detailed letter setting forth reasons why the legislation should expressly deal with the Status of the Bankruptcy Clerk's office. Please note that she does volunteer to testify if further information is needed. I ask that her paper shall appear in the hearings as a formal statement to be published with the hearings.

With best wishes,

Barry

Barry Goldwater

Enclosure

United States Bankruptcy Court
District of Arizona
United States Courthouse
Phoenix, Arizona 85025

Virginia L. Fritz
Clerk

November 8, 1982

Honorable Barry Goldwater
United States Senator
337 Russell House Office Building
Washington, D.C. 20510

Dear Senator Goldwater,

I have been informed that Senator Dole's Committee will be meeting soon to give further consideration to proposed amendments to the Bankruptcy Reform Act of 1978, Public Law 95-598, which would resolve the issue of Article III status for bankruptcy judges and make certain substantive changes in the Bankruptcy Code. Absent from these proposed amendments is any provision which expressly deals with the status of the bankruptcy clerk's office.

The purpose of this letter is to earnestly solicit your aid, in obtaining an amendment to this proposed legislation to ensure that the independence of the bankruptcy clerk's office is preserved.

In support of my request, I offer the following points for your consideration:

First, preservation of an independent bankruptcy clerk's office is consistent with the trend firmly established by recent legislation. The Commission on the Bankruptcy Laws of the United States, established in 1970 by Public Law 91-354, proposed in Section 2-106 of its "Bankruptcy Act of 1973" [*Report of the Commission on the Bankruptcy Laws of the United States*, Part II, July, 1973] that each bankruptcy court have its own clerk. Both the original House [House Report No. 8200, 95th Cong., 1st Sess., §771(a) (1977)] and Senate [Senate Report No. 989, 95th Cong., 2d Sess., § 757(a) (1978)] versions of the Bankruptcy Reform Act authorized the appointment of independent clerks of the bankruptcy court. Even before the Reform Act was enacted into law, Congress passed Public Law 95-383 (September 22, 1978), which provided for the permanent deconsolidation of the bankruptcy clerk's office from the district clerk's office in most districts.

As enacted, Section 233(a) of the Bankruptcy Reform Act of 1978 amended Title 28 of the United States Code to provide, in relevant part, as follows:

> §771. Clerks.
>
> (a) Based on need each bankruptcy court may appoint a clerk who shall be subject to removal only by the court.
>
> (b) The bankruptcy court may appoint necessary deputies, clerical assistants and employees in such numbers as may be approved by the Director of the Administrative Office of the United States Courts. Such deputies, clerical assistants and employees shall be subject to removal only by the court. If there is no clerk, the Bankruptcy Judge shall perform the duties of this subsection.
>
> §775. Salaries of employees.
>
> The salary of an individual appointed or employed under Section 771(a) [Clerks of the United States Bankruptcy Court], 772 [Bankruptcy Judges' law clerks and secretaries], or 773(a) [Bankruptcy Court reporters] of this title shall be the same as the salary of an individual appointed or employed under Section 751(a) [Clerks of the District Courts], 752 [District Judges' law clerks and secretaries], or 753(a) District Court reporters] of this title, as the case may be. The salaries of individuals appointed under Section 771(b) of the title [deputy clerks and other employees of the Bankruptcy Court Clerk's office] shall be comparable to the salaries of individuals appointed under Section 751(b) of this title [deputy clerks and other employees of the District Court Clerk's office].

Pursuant to Section 404(e) of the Reform Act, both the above quoted referenced provisions became effective on October 1, 1979, the effective date of the Bankruptcy Code. These provisions should be retained in any amendments to the Reform Act.

Second, the functions and responsibilities of the bankruptcy clerk justify an independent bankruptcy clerk's office. The bankruptcy clerk is presently responsible for managing three different types of bankruptcy cases (Chapter 7 liquidations; Chapter 11 reorganizations; and Chapter 13 adjustments of debts of individuals with regular income), each of which has unique procedures and clerical responsibilities. The clerk handles not only thousands of consumer cases each year, but also business bankruptcies for partnerships, corporations (both profit and nonprofit), corporate parents and subsidiaries and sole proprietorships. In addition, the bankruptcy clerk is responsible for handling proceedings ancillary to foreign bankruptcies, involuntary bankruptcy cases and joint or consolidated cases. Bankruptcy clerks are also responsbile for handling stockbroker liquidations, municipal reorganizations and railroad reorganizations under special provisions of the Bankruptcy Code.

Bankruptcy clerks manage a broad variety of matters within these bankruptcy cases, including the filing of hundreds of thousands of secured, unsecured and priority claims; objections to exemptions and to plans of reorganization; actions involving the avoidance of liens; preferences; relief from stays against the enforcement of liens and obligations; tax liability, use, sale or lease of property, dischargeability of debts; expenses of administration of bankruptcy estates; appointment of trustees, examiners, accountants, attorneys and other professionals; redemption of property by debtors; abandonment of property from bankruptcy estates; and reaffirmations of dischargeable debts. The foregoing list is illustrative only, and hardly complete.

The bankruptcy clerk also performs quasi-ministerial duties in presiding at meetings of creditors (which, by law, must be held at least once in every bankruptcy case) and in supervising the functions of trustees. The clerk's office is also called upon frequently to render assistance to debtors who file bankruptcy cases without legal counsel. Except for maintaining a jury wheel, the bankruptcy clerk is also fully responsible for jury trials.

In carrying out his or her duties, the bankruptcy clerk is required to maintain dockets and calendars separate from the district court's system; send out notices and orders to creditors and other interested parties; and generally provide, independently from the district clerk, the same clerical and administrative functions for the bankruptcy court as are performed by district clerks for their courts.

All of the functions are performed under unique time pressures inherent in the "expeditious" liquidation of bankruptcy estates, in creditors' demands for payment or for the return of collateral and in the resolution of competing and overlapping interests between debtors and creditors, creditors in various classes, and, in some cases, third parties such as co-debtors, customers, co-owners of property, and buyers of property of a bankruptcy estate, who have themselves not filed bankruptcy cases.

Relative to district clerks, bankruptcy clerks also maintain extremely high levels of personal work contacts with the public in carrying out these responsibilities. Even the smallest consumer case is likely to involve contacts with creditors seeking answers to questions concerning the filing of claims, procedures at meetings of creditors and the administration of the case. This contact increases disproportionately in reorganization cases where large numbers of people in several districts may be affected by the filing of a single Chapter 11 petition.

Third, notwithstanding the above-quoted language in Sections 771 and 775, which require "equality" and "comparability" between district and bankruptcy clerks and their offices, the bankruptcy clerks have struggled (often in vain), since passage of the Reform Act, to obtain adequate compensation and funding for staff, for facilities, and for material, relative to the district clerks, which are necessary to effectively carry out the mission of the bankruptcy clerk's office. Ironically, these difficulties have been encountered during a period of economic recession which has seen the number of bankruptcy filings in most districts, including Arizona, increase tremendously over the last three years.

In the absence of a clarifying amendment which preserves the progress made by the Deconsolidation Act and the Reform Act, the office of the bankruptcy clerk will probably be relegated to its traditional role as the nominal subordinate of the district clerk, with all of the biases, injustices and inefficiencies inherent in that scheme.

Fourth, the preservation of an antonomous bankruptcy clerk's office is not inconsistent with a judicial scheme which would make the bankruptcy court a division of the federal district court. Given the very distinct managerial and administrative functions and responsibilities of bankruptcy and district court clerks, it makes no sense to consolidate the clerk's offices. Each court should have its own clerk.

Fifth, and finally, the office of the bankruptcy clerk demands the skills and capabilities of an administrator no less qualified than a district clerk. In order to attract and retain qualified individuals as bankruptcy clerks, adequate compensation of bankruptcy clerks, and their staffs, is essential. Consolidation with the district clerk's office would merely create an excuse, because of the nominal increase in the district clerk's supervisory responsibilities, for perpetuating the traditional system of inequality of compensation without regard to the actual responsibilities and workload involved in the bankruptcy clerk's position.

For all of the reasons discussed above, I respectfully request that you assist us in keeping an independent bankruptcy clerk's office. Since I believe that the old adage, "A picture is worth a thousand words", is applicable in these circumstances, I would also like to invite you to visit our bankruptcy clerk's office the next time you are in Phoenix, to enable you to see our operations firsthand and to personally answer any questions you may have concerning our functions and workload.

Thank you very much for your consideration. I am available to testify or to furnish further information concerning the United States Bankruptcy Court. My telephone number is (602) 261-3329.

Respectfully yours,

Virginia L. Fritz

VIRGINIA L. FRITZ
Clerk, United States Bankruptcy Court
District of Arizona

VLF:lb

AMERICAN BAR ASSOCIATION

Writer's Direct Number: (502) 636-3532

November 23, 1982

Honorable Robert Dole
Chairman, Subcommittee on Courts
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Your Subcommittee has recently held hearings on "Amendments to the Bankruptcy Code relating to the Northern Pipeline Decision." We request that this letter be included in the record of these hearings.

In response to the uncertainties created by the Supreme Court decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., the American Bar Association this past summer created a Task Force on the Status of Bankruptcy Court Judges. A list of the members of the Task Force is enclosed. On September 21, 1982, upon recommendation of the Task Force, the following resolution was adopted by the Executive Committee of the Board of Governors as the policy statement of the American Bar Association:

RESOLVED, That:

1. The U.S. Department of Justice is urged to seek from the U.S. Supreme Court an extension of the present stay beyond October 4, 1982 in the case of Northern Pipeline Construction Co. v. Marathon Pipe Line Co.
2. Congress is urged to provide, pending a conclusion on the permanent status of the bankruptcy courts, that a de novo determination by the district courts be made in those cases where an issue is required to be heard by an Article III judge.
3. Congress is urged to restructure bankruptcy courts by June, 1983 but after February, 1983.

Since the Board of Governors adopted its resolution, as you are well aware, the U.S. Supreme Court extended its stay of judgment in the Northern Pipeline Decision until December 24, 1982.

The Association believes that the uncertainties resulting from the Northern Pipeline Decision must be resolved as soon as possible. However, because the selection of one alternative over the other would have such a major impact on the court system, the ABA believes that Congress should not make a hasty judgment on the issue. Therefore, the ABA has sent a copy of the ABA's resolution, urging an extension of the stay,to the Department of Justice.

Pending a resolution of the permanent status of the bankruptcy courts, we urge you to work toward immediate enactment of a statute providing for a de novo determination to be made by federal district courts in those bankruptcy cases in which an issue is required to be heard by an Article III judge. Enactment of this legislation, coupled with the granting of an extended stay, should permit Congress, the ABA and other interested groups sufficient time to fully respond to this problem early in the 98th Congress.

Should the Supreme Court grant a further stay, we will continue to study the issue and report our recommendations to you.

Thank you for affording the American Bar Association the opportunity to submit its views to your Subcommittee.

Sincerely,

L. Stanley Chauvin, Jr.
Chairman, Task Force on the
Status of Bankruptcy Judges
1346 South 3rd Street
Louisville, Kentucky 40208

LSC:tam
Enclosure
cc: Members, Senate Judiciary Subcommittee on Courts

TASK FORCE ON THE STATUS OF BANKRUPTCY COURT JUDGES

L. Stanley Chauvin, Jr., Chairman
Louisville, Kentucky

Judge Griffin B. Bell
Atlanta, Georgia

Edward I. Cutler
Tampa, Florida

Robert M. Ervin
Tallahassee, Florida

Herman L. Glatt
Los Angeles, California

Albert E. Jenner, Jr.
Chicago, Illinois

Judge Joe Lee
Lexington, Kentucky

Judge James E. Noland
Indianapolis, Indiana

J. Ronald Trost
Los Angeles, California

E.C. Ward
Natchez, Mississippi

BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM
WASHINGTON, D. C. 20551

OFFICE OF THE GENERAL COUNSEL

November 24, 1982

Richard W. Velde, Esq.
Chief Counsel
Committee on the Judiciary
Subcommittee on Courts
United States Senate
2204 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Velde:

I am enclosing draft amendments to the Bankruptcy Code concerning repurchase agreements. The language represents a working draft, which I understand will be incorporated into the draft bill that will be introduced shortly.

As indicated in Chairman Volcker's letter to Chairman Dole, we believe the amendments are necessary to protect the financial markets for repurchase agreements in U.S. government and agency securities, certificates of deposit and bankers' acceptances. These amendments are consistent with and are parallel to the technical amendments to the Bankruptcy Code enacted by Congress last July.

A formal Board position concerning the amendments will be forwarded to the Committee early next week

If you have any questions concerning this matter, please feel free to contact me.

Sincerely,

Michael Bradfield
General Counsel

Enclosure

Subtitle ___ -- Amendments Regarding Repurchase Agreements

SEC. ___ Section 101 of title 11, United States Code, is amended --

(a) by redesignating paragraphs (35), (36), (37), (38), (39), (40), and (41), as paragraphs (37), (38), (39), (40), (41), (42), and (43), respectively, and

(b) by inserting after paragraph (34) the following new paragraph:

"(35) 'repo participant' means any entity that, on any day during the period beginning 90 days before the date of the filing of the petition, has or has had one or more outstanding repurchase agreements with the debtor with an aggregate repurchase price of $1,000,000 or more."

(c) by inserting after paragraph (35) the following new paragraph:

"(36) 'repurchase agreement' also includes a reverse repurchase agreement and means an agreement (whether characterized as a purchase and sale, an executory contract, a loan or otherwise), including related terms, for the transfer of bankers' acceptances, certificates of deposit, or securities that are direct obligations of, or that are fully guaranteed as to principal and interest by, the United States or any agency of the United States, against the transfer of funds with a simultaneous agreement by the transferee to transfer to the transferor against the transfer of funds, at a date certain or on demand, bankers' acceptances, certificates of deposit or securities as described above which are the same as, or are substituted for, those transferred by the transferor to the transferee."

SEC. ___ Section 362(b) of title 11, United States Code, is amended --

(a) by redesignating paragraphs (7) and (8) as paragraphs (8) and (9), respectively, and

(b) by inserting after paragraph (6) the following new paragraph:

"(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;"

SEC. ___ Section 546 of title 11, United States Code, is amended by inserting after paragraph (d) the following new paragraph:

"(e) Notwithstanding sections 544, 545, 547, 548(a)(2), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, made by or to a repo participant, in connection with a repurchase agreement and that is made before the commencement of the case, except under section 548(a)(1) of this title."

SEC. ___ Section 548(d)(2) of title 11, United States Code, is amended by inserting after paragraph (B) the following new paragraph:

"(C) a repo participant that receives a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, in connection with a repurchase agreement, takes for value to the extent of such payment."

SEC. ___ Section 553(b)(1) of title 11, United

States Code, is amended by inserting ", 362(b)(7)," after "362(b)(6)".

SEC. ___ (a) Chapter 5 of title 11, United States Code, is amended by adding at the end thereof the following new section:

"§ 557. Contractual right to liquidate a repurchase agreement

The exercise of a contractual right of a repo participant to cause the liquidation of a repurchase agreement because of a condition of the kind specified in section 365(e)(1) of this title shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by order of a court or administrative agency in any proceeding under this title, unless, where the debtor is a stockbroker or securities clearing agency, such order is authorized under the provisions of the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa *et seq.*) or any statute administered by the Securities and Exchange Commission. In the event that a repo participant liquidates one or more repurchase agreements with a debtor and under the terms of one or more such agreements has agreed to deliver assets subject to repurchase agreements to the debtor, any excess of the market prices received on liquidation of such assets (or if any such assets are not disposed of on the date of liquidation of such repurchase agreements, at the prices available at the time of liquidation of such repurchase agreements from a generally recognized source or the most recent closing bid quotation from such a source) over the sum of the stated repurchase prices and all expenses in connection with the liquidation of such repurchase agreements shall be deemed property of the estate, subject to the available rights of setoff. As used in this section, the term 'contractual right' includes a right set forth in a rule or bylaw, applicable to each party to the repurchase agreement, of a national securities exchange, a national securities association, or a securities clearing agency, and a right, whether or not evidenced in writing, arising under common law, under law merchant or by reason of normal business practice."

(b) The analysis of sections for chapter 5 of title 11, United States Code, is amended by adding at the end thereof the following new item:

> "557. Contractual right to liquidate a repurchase agreement."

SEC. ___ The amendments made by this Subtitle shall become effective upon the date of enactment, provided that they shall apply only to cases commenced on or after the date of enactment.

ASBESTOS COMPENSATION COALITION

November 29, 1982

Senator Robert Dole, Chairman
Subcommittee on Courts
Senate Judiciary Committee
2204 Dirksen SOB
Washington, D.C. 20510

Dear Senator Dole:

As a result of your November 10 hearings on the Bankruptcy Act of 1978, you have asked for further comments from interested parties on potential solutions to problems related to recent bankruptcy filings by asbestos companies.

Many of the hearing witnesses pointed out the need to revise the bankruptcy system, while others called for a broad legislative solution to deal with the problem of compensating victims through creation of a no-fault compensation fund.

It is this concept that the Asbestos Compensation Coalition supports. The Coalition, consisting of asbestos manufacturers who are seeking a legislative solution, has put its recommendations into a draft proposal. For the record, we have enclosed a copy of this proposal, along with a summary sheet and a section-by-section analysis.

This proposal provides the framework for compensating victims of occupational diseases, such as asbestos-related diseases, which would be covered in an implementing resolution. The fund would include contributions from asbestos companies and their insurers and the federal government, which has a responsibility toward half of the asbestos victims who were excessively exposed to asbestos in government supervised shipyards during and after World War II.

This proposal would compensate victims more equitably and promptly than the court system -- or the bankruptcy courts -- and thus merits consideration by Congress .

Sincerely,

Bill McLaughlin

Bill McLaughlin
Chairman

1825 K STREET, N.W. SUITE 210 WASHINGTON, D.C. 20006 (202) 466-8500

HIGHLIGHTS OF THE OCCUPATIONAL DISEASE COMPENSATION IMPROVEMENT ACT

The major features of the Occupational Disease Compensation Improvement Act (ODCIA) are: *

Central Purpose

The ODCIA will set up a statutory framework to compensate victims of occupational diseases through a no-fault program that will complement workers' compensation systems and make awards more rapidly and equitably than litigation in the courts.

Resolutions for Covered Diseases

The ODCIA does not automatically cover specific occupational diseases, but will compensate only those diseases that are designated for coverage by Congress in a separate "implementing resolution." Each resolution will specify the disease or diseases to be brought into the program, the amount of benefits to be paid, and how benefits will be funded.

Benefits

The benefit formula adopted for each class of covered diseases must be sufficient to provide a reasonable substitute for the litigation that will be replaced by ODCIA. In the case of asbestos-related diseases, the resolution will provide a maximum benefit equal to 92 times the average weekly wage in the individual's state (about $30,000).

Full ODCIA benefits will be paid only when a covered disease results in disability or death, but partial disability will be compensated proportionately. Recipients can choose to be paid either in a cash lump sum or by a commercially available annuity.

To receive ODCIA benefits, an individual must have a decision from his own workers' compensation program confirming the presence of a covered occupational disease. However, certain individuals who are not covered by workers' compensation also can qualify for ODCIA benefits. For example, household members exposed to a worker's contaminated clothing may be included in the ODCIA, even though they are not covered by current workers' compensation programs. In addition, employees whose diseases developed many years after their last exposure to disease-producing materials can receive ODCIA benefits, even though they may be barred from benefits under some workers' compensation programs.

Claims Administration

Either an existing state agency (acting under contract) or the Social Security Administration will process a claim for ODCIA benefits. With few exceptions, the agency processing a claim may not act on an ODCIA application before an award is issued by the appropriate workers' compensation program. Once such an award is issued, the agency must abide by the workers' compensation program findings.

Financing Benefits

Each resolution may establish its own method for financing benefits. In the case of asbestos-related diseases, funds

---

* More detailed summaries and analyses are available from the Asbestos Compensation Coalition, 1825 K St., NW, Suite 210, Washington, DC 20006, 202/466-8500.

will come from three sources: asbestos producers, their insurance companies, and the federal government.

An asbestos producer's share of the total funding will be based on the amounts it has already paid in asbestos disease cases. In turn, each producer can allocate its share of the cost to insurance companies whose policies would have covered the producer's asbestos disease claims. Because about one-half of all current asbestos claims are the result of federal government activities and requirements -- including government shipyards, contract specifications, and sales from government stockpiles -- the federal government will contribute one-half of the asbestos compensation fund.

Exclusive Remedy

Supplemental benefits provided by ODCIA, together with any available workers' compensation benefits, are the exclusive remedy for diseases covered under ODCIA. All those who contribute to a fund for covered diseases will be fully protected against lawsuits for those diseases.

Automatic Sunset Provision

Each implementing resolution has a limited life of between five and ten years. The asbestos resolution will expire ten years after enactment. Unless Congress reauthorizes it, no further contributions will be made after the resolution expires. If ever the funds collected are insufficient to pay benefits, the program will end, and claimants' right to sue will be restored.

I. SECTION-BY-SECTION SUMMARY: OCCUPATIONAL DISEASE COMPENSATION IMPROVEMENT ACT--JULY, 1982 DRAFT

SECTION 1--SHORT TITLE AND TABLE OF CONTENTS

Section 1 provides that the legislation may be cited as the "Occupational Disease Compensation Improvement Act."

SECTION 2--FINDINGS AND PURPOSE

The Act's purpose is to provide prompt, exclusive, and fair compensation for diseases caused by occupational exposure to toxic materials and to allocate the cost of such a program in an equitable manner.

SECTION 3--DEFINITIONS

This section sets forth several definitions used in the Act. "Occupational exposure" to a toxic material--a key definition--means both direct exposure in the course of employment and indirect exposure brought about by a household member's direct exposure through employment. Employment for this purpose includes service in the armed forces and government agencies, as well as service in the private sector.

TITLE 1--SUPPLEMENTAL BENEFITS

SECTION 101--ENTITLEMENT TO SUPPLEMENTAL BENEFITS

The Act provides for the payment of benefits when compensable occupational exposure to toxic materials causes a "designated disease" that in turn causes permanent disability (total or partial) or death. Congress will determine the diseases to be compensated through the enactment of "implementing resolutions." Implementing resolutions will also state "supplemental benefit factors" which determine the size of benefits paid for the designated diseases.

The benefit for total disability or death will equal the supplemental benefit factor for the designated disease in question, multiplied by the applicable state-wide average weekly wage. The state-wide average weekly wage will ordinarily be determined for the year the claimant first filed for benefits and for the state where the employment occurred.

Partially disabled persons will receive a partial benefit in proportion to the degree of their disability. Partial causation by non-compensable causes will reduce benefits, if such a reduction is required under the state or federal workers' compensation program covering the affected person's employment.

Payments are made either in a cash lump sum or by the purchase of a commercially available annuity, generally at the option of the recipient. All benefit payments are made to the affected person while alive, and thereafter to the surviving spouse or children.

SECTION 102--CLAIMS PROCEDURE

A claimant generally must file for and be granted a workers' compensation award under an existing state or federal workers' compensation plan before a supplemental benefit may be granted under the Act. Determinations made under the Act will generally be based on the prior determinations of the workers' compensation program with aspect to the claimant.

An independent determination may be made under the Act only when the workers' compensation program has not, or would not, reach the key issues for supplemental benefit eligibility, or when the program unreasonably delays the processing of the claimant's workers' compensation application. Such independent determinations will follow the law of the applicable workers' compensation program.

If the applicable workers' compensation program has unreasonably delayed its decision or has made a decision still subject to administrative or judicial review, qualified claimants may receive supplemental benefits on an interim basis, in monthly installments, but only if the workers' compensation program would also provide benefits on an interim basis under similar circumstances. Interim payments cease in all cases when the applicable workers' compensation program makes a final determination.

Claims must generally be filed within certain specified periods after the date of death or medical determination of disability, but these limitations periods will not bar any claim that is filed within one year after the effective date of the applicable implementing resolution. Administrative responsibility will be delegated to state agencies by contract, if they so desire, but claims will otherwise be processed through the Social Security Administration.

SECTION 103--DESIGNATED DISEASES; COMPENSABLE EXPOSURE

Implementing resolutions will designate the diseases and types of occupational exposure that are compensated under the Act. The designations will be codified as notes to this section in the United States Code.

SECTION 104--INFORMATION DOCUMENTS

This section requires the Department of Health and Human Services to publish "Medical Assessment Information Documents" within 18 months after any disease is designated for coverage under the Act. These documents will provide non-binding background information and recommendations to assist in reaching scientifically sound judgments about applications for supplemental benefits.

TITLE II--FINANCE

SECTION 201--IMPOSITION OF OCCUPATIONAL DISEASE TAX

The private sector's contributions to the funding of the program will take the form of taxes under a new section 4711 of the Internal Revenue Code. The amount of these taxes, and the identity of those who must pay, will be established by Congress in implementing resolutions.

SECTION 202--ESTABLISHMENT OF TRUST FUND

This section establishes the Occupational Disease Trust Fund and provides for the creation of separate accounts for different groups of designated diseases.

SECTION 203--EXPENDITURES FROM TRUST FUND

This section limits the use of Trust Fund monies to the payment of supplemental benefits, expenses and costs, and the funding of authorized grants and contracts.

SECTION 204--ADMINISTRATIVE PROVISIONS

This section provides for the sound management of the Trust Fund. If an implementing resolution provides for loans to the Trust Fund, any such loans must be repaid with interest as soon as funds are available. The Trust Fund may bring suit to enforce the rights of each supplemental benefit recipient against any entity not protected from suit, and may recover up to the amount of the supplemental benefit paid.

SECTION 205--TRUST FUND CONSERVATION COMMITTEE

This section creates a Trust Fund Conservation Committee to oversee management of the Trust Fund and to award certain contracts and grants. The Committee is composed of representatives of both the public and private sectors.

SECTION 206--GRANTS AND CONTRACTS FOR PROGRAM IMPROVEMENT

The Trust Fund Conservation Committee is authorized to make grants or contracts for projects that will improve state and federal agencies' ability to make sound medical determinations related to workers' compensation or supplemental benefits.

TITLE III--IMPLEMENTING RESOLUTIONS

SECTION 301--REQUIREMENTS FOR RESOLUTIONS

This section provides that Congress may effectuate the Act only by adopting a joint "implementing resolution" containing the provisions that are called for in section 302.

SECTION 302--ELEMENTS OF IMPLEMENTING RESOLUTIONS

Each implementing resolution must designate the diseases and forms of compensable exposure for which benefits will be paid under the Act, adopt the supplemental benefit factors for that set of diseases, impose taxes to fund the program, determine the amount of the federal government's contribution--if any--and authorize appropriations and appropriate funds. Authorizations and appropriations may not cover less than five years, nor more than ten years.

Only those diseases that present a significant national problem or for which there is particular federal responsibility may be designated for compensation under an implementing resolution. The supplemental benefit factor adopted by a Resolution must be sufficient to insure that the Act provides a reasonably just substitute for the tort law remedies replaced by the Act. Taxes imposed by the Resolution must be equitably allocated among responsible businesses and their insurance carriers, and the federal government may be required to contribute to the funding of the program only to the extent of its specific responsibility for the diseases in question.

TITLE IV--MISCELLANEOUS

SECTION 401--THIRD-PARTY AND COMMON-LAW ACTIONS

This section substitutes benefits provided under the Act for the recoveries that currently can be sought through litigation. Entities subject to a tax under the Act are protected from all liability for damages caused by compensable exposure (although they will remain liable for workers' compensation). If Congress chooses to structure the tax around the sale, production, use, etc., of the relevant toxic material, protection will extend both to taxpayers and to non-taxpaying entities who are in the commercial chain. Finally, the federal government is also protected from suit.

These restrictions on liability will have only prospective effect. Existing plaintiffs, however, will be given the option to elect coverage under the Act in place of their pending litigation.

SECTION 402--SEPARABILITY; NULLIFYING CIRCUMSTANCES

This section provides that the Act's provisions are generally "separable"--that is, if a court rules that any of them is invalid, the remainder will not be affected. Implementing resolutions can, however, contain special provisions overriding this general rule.

SECTION 403--ADMINISTRATIVE AUTHORITY AND JUDICIAL REVIEW

This section authorizes delegation of responsibility and promulgation of regulations under the Act. It also prescribes the time and place for judicial review of certain rules and regulations.

SECTION 404--ADMINISTRATIVE EXPENSES

This section provides that all costs of administering the Act will be paid from the Trust Fund.

SECTION 405--CERTAIN LANGUAGE INCLUDED FOR CONVENIENCE

The Act's headings, subheadings, and parenthetical cross-references have no legal effect.

SECTION 406--EFFECTIVE DATE

Except as otherwise provided, the Act is effective upon enactment.

II. SECTION-BY-SECTION SUMMARY: IMPLEMENTING RESOLUTION FOR ASBESTOS RELATED DISEASES--JULY, 1982 DRAFT

SECTION 1--SHORT TITLE AND TABLE OF CONTENTS

Section 1 provides that the Resolution may be cited as the "Implementing Resolution for Asbestos Related Diseases."

SECTION 2--DESIGNATED DISEASES; COMPENSABLE EXPOSURE

The Resolution designates for compensation the following asbestos related diseases: asbestosis, mesothelioma of the pleura or peritoneum, bronchogenic cancer, or cor pulmonale secondary to asbestosis. No limitations are set on the kinds of occupational exposure--as defined in the Occupational Disease Compensation Improvement Act--that can give rise to a compensable designated disease. Thus, household members disabled from exposure to asbestos from a worker's clothing may become eligible for compensation.

SECTION 3--SUPPLEMENTAL BENEFIT FACTOR

Section 3 establishes 92 as the "supplemental benefit factor" for all asbetos related diseases. The number 92 is expected to result in an average supplemental benefit for total disability or death of approximately $30,000.

SECTION 4--IMPOSITION OF TAXES

This section establishes an Asbestos Related Disease Tax to be imposed between 1982 and 1993, identifies the entities that will be liable for the tax, and provides a formula for computing the total tax and each taxpayer's share of it. The total tax for the first two years is fixed at $150 million and $90 million, respectively. Thereafter, the total tax will be experience-rated, i.e., the tax each six months will equal one-half the amount expended from the Asbestos Related Disease Account during a previous six-month period, subject to certain adjustments designed to prevent excess or insufficient funding.

Those subject to this tax will be--(1) manufacturers and producers of asbestos and asbestos products who have been named as defendants in at least 500 cases; and (2) insurers whose policies have covered the manufacturers' and producers' losses due to asbestos disease at any time during the last 50 years. Insurers will be responsible for the manufacturer's or producer's share of the tax, but will not be liable for more than the face values of their policies, reduced by amounts already paid under those policies. The manufacturer or producer will itself be responsible for the remainder of the tax.

Among taxpaying asbestos manufacturers and producers, the tax burden is allocated in proportion to the actual and projected dollar amount of each manufacturer's or producer's settlements and judgments in the asbestos related disease cases that were pending from January 1, 1960 through January 1, 1982. Asbestos manufacturers and producers who do not meet the 500-case criterion for automatic inclusion as a taxpaying entity may petition for inclusion under the program; the share of the tax to be borne by such manufacturers or producers will be determined by the Secretary of the Treasury.

Among the taxpaying insurers of a given asbestos manufacturer or producer, the tax is generally divided in proportion to the value of the coverage remaining under the relevant policies, subject to appropriate adjustments for policies providing only "excess" or pro-rata indemnity.

Members of the asbestos industry and their insurers may alter by mutual agreement their respective shares of the total tax, as long as the aggregate of the amounts paid by each of them equals the total tax owed in the absence of any agreement. Reinsurers share the assessment with insurers in the same way that insurers share the assessment with the manufacturers and producers.

Bankrupt or reorganized asbestos manufacturers and producers, and their successors, will remain liable for any tax imposed under the Resolution.

SECTION 5--ESTABLISHMENT OF ACCOUNT; APPROPRIATIONS; AUTHORIZATIONS

This section establishes the Asbestos Related Disease Account, authorizes appropriations to the Trust Fund for the years 1983 through 1992, and appropriates monies to be credited to the Asbestos Account. Appropriations are automatically made for all taxes and matching federal contributions as they become due, for a repayable advance from the Treasury before the first tax due date, and for subsequent repayable advances from the Treasury whenever the amount in the Asbestos Account totals less than $100,000. These automatic appropriations may not exceed $300 million for the fiscal year 1983 or $180 million for any fiscal year between 1984 and 1992.

SECTION 6--NULLIFYING CIRCUMSTANCES

This section provides that the entire Resolution is void if, because of a judicial finding of invalidity or unconstitutionality, any of the following is rendered "substantially ineffectual": the provision of supplemental benefits; the imposition of asbestos related disease taxes; or the protection against suit provided by the Act's exclusive remedy provisions. This section also provides that the Resolution is void if the obligations of the Asbestos Account exceed its resources for a period of 30 or more days on which the Congress is in session.

SECTION 7--DEFINITIONS

This section adopts by reference the definitions contained in section 3 of the Occupational Disease Compensation Improvement Act.

SECTION 8--EFFECTIVE DATE

The Resolution will become effective 30 days after it is approved.

OWENS-ILLINOIS

John S. Andrews
Vice President
National Affairs

November 29, 1982

The Honorable Robert Dole
United States Senate
Washington, D. C. 20510

Dear Bob:

In the 1940's, the Owens-Illinois Research Department developed a high temperature asbestos-based insulation, the commercial sale of which commenced in 1948. Because this product was not compatible with our standard product lines, the asbestos division was sold to an insulation manufacturing company in 1958. We have had no relationship with the asbestos business during the past twenty-four years. As you might expect, however, our involvement in that business, even so long ago and for such a relatively short period of time, has made us potentially liable for asbestos-related claims. We have been named as co-defendants with Manville in numerous asbestos cases.

During your November 10, 1982 hearings on the Manville bankruptcy, you stated that "the use of Chapter 11, at least in Manville's case, could have certain significant advantages, not only to Manville, but also to asbestos victims." You also invited those testifying and others to do some creative thinking on the subject. Owens-Illinois has been considering how the current situation can be developed to provide maximum recovery to claimants with the least distortion and disruption of existing law.

As result, we have developed a technical amendment to the Bankruptcy Code which would permit, but not require, a Bankruptcy Court to resolve mass tort and other litigation when appropriate and deemed desirable by all parties, including the claimants. In other words, this would be a voluntary procedure by all concerned for it to become operative. We are placing the text of this amendment and explanatory testimony by Harvey Miller of Weil, Gotshal & Manges, special counsel to Owens-Illinois, in the November 10, 1982 Hearing record.

The proposed technical amendment--currently supported by nine other companies--merely clarifies authority under existing bankruptcy law to permit non-Chapter 11 companies who are jointly liable with a debtor to contribute to a settlement fund potentially created under a Chapter 11 reorganization plan. The amendment would also eliminate unnecessary Chapter 11 filings and relieve the very substantial case load pressure on the court system.

We believe that the current lame duck session is the appropriate time for this amendment, because Congress is considering a package of Bankruptcy Code improvements. In addition, the Manville situation itself is currently at the stage when the proposed amendment will be most beneficial. The intense pressure to settle and compromise differences that exists at the outset of a Chapter 11 filing will dissipate as the months go by. Furthermore, we believe that this amendment could get funds quickly to the deserving claimants in these asbestos cases who are now caught in the confusion of stays and other procedural hurdles that the Manville filing has created.

Last week, we discussed the amendment with Pete Velde and Doug Comer, both of whom seemed favorably disposed, but naturally indicated you would make the final decision as to whether or not it could be considered at this time. I ask that you review the attached amendment. I would hope you could agree to include it in your package of amendments to the Bankruptcy Code.

I know the time constraints upon you, but we would certainly appreciate an opportunity to discuss this proposal personally with you at your earliest convenience.

As you know, there are literally thousands of court cases pending, with thousands more to come.

For our part, we would hope they will be settled equitably and more promptly than the present situation will provide. We believe our proposed amendment offers this opportunity.

Thank you for your consideration.

Very truly yours,

John

John S. Andrews

JSA:mh

Attachment

PROPOSED ADDITION TO SECTION 1123(b) OF THE BANKRUPTCY CODE

1123(b)

(5) provide for the settlement or adjustment of claims, whether or not contingent or unliquidated and as to which the debtor may be liable (singly, jointly, severally, comparatively, or otherwise) by the creation of a fund or other settlement provisions requiring the holders of such claims and any other entities that contribute to the fund or to the implementation of the settlement provisions, as a condition to participating in or contributing to the fund or other benefits of the settlement provisions, to release the debtor and the contributing entities from all present and future claims based upon or related to the claims so settled or adjusted.

SUPPORTING EXPLANATION FOR PROPOSED AMENDMENT TO 11 U.S.C. § 1123(b)

Purpose of Proposed Amendment

1. Clarify existing law under chapter 11 of the Bankruptcy Code to enable a single chapter 11 plan to resolve claims involving multiple parties.

2. Simplify resolution of such claims through a single settlement fund to which the debtor and non-debtors jointly liable contribute, without requiring separate, expensive and protracted litigation in multiple forums.

3. Assist in eliminating unnecessary potential filings for reorganization under the Bankruptcy Code by parties jointly liable on such claims.

The Proposed Amendment Would:

1. Clarify authority under chapter 11 of the Bankruptcy Code to provide for the settlement or adjustment, on a voluntary basis, of claims, including personal injury and property damage claims, against the debtor and others through a chapter 11 plan;

2. Permit, but not require, that settlement of such claims be provided for through the creation of a fund;

3. Permit, but not require, persons jointly liable with the debtor as to such claims, to contribute to the fund;

4. Permit, but not require, holders of such claims to participate in the benefits of the fund;

5. Require holders receiving the benefits of the fund to release the debtor and persons contributing to the fund; and

6. Require those persons who contribute to the fund to release other contributors from all related claims so settled or adjusted.

Broader Impact of Proposed Amendment

The proposed Amendment would enable a single chapter 11 plan to resolve multiple party claims, such as mass tort claims and related litigation, in a manner that:

1. Provides *more monies to claimaints* since contributions from non-debtors, as well as monies of the estate, would be available for distribution;
2. Equitably allocates distributions among *present and future* claimants who suffer from similar injuries;
3. Largely *eliminates huge transaction costs* associated with mass litigation, thereby assuring that more of every dollar spent goes to injured parties; and
4. *Relieves massive pressure on the court* system imposed by piecemeal resolution of such litigation.

Key Characteristics of Proposed Amendment

1. *Optional* - The Amendment merely creates an option for parties to negotiate a plan that resolves complex claims in an efficient manner.
2. *Limited Scope* - The Amendment does not address the *Marathon*[*] jurisdictional issue.
3. *Mechanics Flexible* - The Amendment leaves to a *case-by-case basis* the exact mechanism for ensuring adequacy of the fund and the manner for presenting claims against it. Negotiation among the interested parties in a particluar case would "hammer out" specific mechanics. Fairness of the fund mechanics would be tested on a case-by-case basis through the confirmation process and judicial scrutiny and review.

---

[*] *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co., et al.* 102 S.Ct. 2858 (1982).

STATEMENT OF THE AMERICAN BAR ASSOCIATION

PRESENTED BY JOAN M. HALL

Mr. Chairman and Members of the Subcommittee:

My name is Joan M. Hall, I am chairman of the Section of Litigation of the American Bar Association, and have been designated by Morris Harrell, President of the Association, to express the views of the ABA on the question of abolishing diversity of citizenship as a basis of jurisdiction of federal district courts.

I note that no legislation to abolish or curtail diversity jurisdiction has been introduced in the Senate during the 97th Congress. In the House, however, the Judiciary Committee has reported H.R.6691, to abolish diversity jurisdiction, and that proposal was also included in H.R.7294, the bankruptcy court/court reform package which was introduced in the House before the election recess. No comparable language was included in the Senate version of that legislation. I will, therefore, address my comments to the House language.

We at the ABA view these hearings as an opportunity to bring the expertise and experience of the organized bar to this issue. Since 1978, the ABA has been on record as opposed to legislation that would abolish or significantly reduce the diversity jurisdiction of the federal courts. We therefore oppose H.R.6691.

For nearly 200 years, diversity jurisdiction has served the ends of justice well. Congress should not alter that jurisdiction in the absence of a compelling showing of need for change. The ABA believes that the proponents of change have not made, and cannot make, this showing.

The arguments of both proponents and opponents of legislation to abolish or curtail diversity jurisdiction are familiar to the Subcommittee. Because the pros and cons on the subject have been widely aired, I would like to state simply the major arguments. Proponents generally argue that diversity jurisdiction has outlived its usefulness and that abolishing or curtailing diversity jurisdiction could reduce the overburdened federal court caseload. Those who oppose change in the present law cite fairness and avoidance of prejudice as the major reason why diversity jurisdiction should be retained by the federal courts.

We do not question Congress' authority to decide what role diversity jurisdiction should play in our judicial system. The ABA acknowledges that Congress constitutionally has great discretion in deciding the diversity jurisdiction question. It could give federal courts diversity jurisdiction to the fullest extent possible; it could do away with diversity jurisdiction; it could bar in-state plaintiff diversity jurisdiction. So long as Congress applies a neutral standard of allocation, its discretion is unrestricted. Our opposition is based on policy grounds. We believe that overriding policy considerations dictate that the current system of diversity jurisdiction should be retained.

The major justification for diversity jurisdiction, which lies at the heart of the ABA position, is preserving the citizen's access to justice. The availability of an alternative forum is often a "condition of justice," well worth its minor costs.

Although some suggest that there is no longer any significant prejudice in state courts against out-of-state litigants, trial lawyers know first hand that local prejudice exists, not only in state courts but sometimes in federal courts as well. Prejudice cannot be eliminated, but the availability of the federal forum for some cases gives litigants a choice that can be used to avoid or minimize prejudice in cases where it is likely to occur. And although some suggest that state juries are not different from federal juries because they are drawn from the same population, there are dramatic differences between one-county jury panels in state courts and district-wide and often state-wide panels in federal courts. A fair result often depends on the ability to avoid a narrow, local bias. The concurrent availability of an alternative federal forum is often the only bulwark against that prejudice.

Other than claims that diversity cases represent an unnecessary burden on the federal courts, there is no serious criticism of the handling of diversity cases. On the whole, there seems general satisfaction with the way these cases are handled, provided that docket delays are not intolerable. Even concern over such matters as technical jurisdictional questions is seldom directed to quality of result but rather to the burden imposed. The problem seems always to come down to the question of judicial resources.

If court congestion is the problem, the solution is not to limit the public's access to the system by reducing the scope of jurisdiction, when that jurisdiction is serving a useful purpose in our society. Diversity jurisdiction should not be blamed for the fact that many federal courts are crowded.

For the reporting year ending June 30, 1981, 180,576 civil cases were filed in federal district court, of which 45,442 were there by virtue of diversity jurisdiction. Lawyers and their clients have not increased their reliance on diversity jurisdiction. The percentage of total caseload in the federal courts consisting of diversity cases remains at about 25 percent. Congestion in the federal courts comes from the increased criminal caseload, the statutory creation of new federal causes of action, geometric increase in controversy that comes with increased population, and not least, from the increasing litigiousness of the American public and their government.

Moreover, the dollar cost of diversity jurisdiction is de minimis, both relatively and absolutely. According to a 1979 estimate prepared by the Administrative Office of the United States Courts, eliminating diversity cases would save $8.8 million each year once the pending cases are terminated. This figure is approximately two percent of the $450 million budget for the entire federal judiciary, which itself represents less than one-tenth of one percent of total federal expenditures. Given the numbers, it is difficult to sustain the proposition that diversity jurisdiction is a luxury we can no longer afford. We believe that the benefits of retaining diversity jurisdiction outweigh its small cost.

The argument that diversity cases should be shifted from the federal courts, which are overburdened, to the state courts, which can easily absorb them because of the state system's collectively larger capacity, is an inaccurate over-simplification. Some federal district courts are not overburdened. Some state courts are so overburdened that it takes four years or more to get a case to trial. Obviously, justice will not be served by transferring cases from one logjam to another.

The most obvious cure for any overburdened justice system is to increase the capacity of the system. Another possibility is to improve the efficiency of the system through such means as experimentation with compulsory arbitration for certain kinds of cases and reduction of the abuse of civil discovery procedures. The American Bar Association has been in the forefront of support for these studies and improvements. Other adjustments and improvements can and should be made, and we commit ourselves to earnest and principled service in the cause of that improvement. But we unqualifiedly oppose the solution offered by H.R.6691 that would cut off from the federal courts a category of litigants because they are perceived as exceeding the capacity of the courts.

Some have advocated a "compromise" solution of curtailing diversity jurisdiction by legislation that would deny a plaintiff access to any federal district court in the state of which he is a citizen. They argue that a plaintiff suing in his own state cannot be said to need a federal court for the purpose of avoiding local prejudice. This argument assumes that avoidance of prejudice is the only justification for diversity jurisdiction. Furthermore, this kind of change would have some highly undesirable consequences. Its practical effect would be to deprive the injured individual who has a claim against a national corporation (incorporated and having its principal place of business in another state) of access to the federal court in his home state even though his interest would be better served in federal court. The alternative of starting the suit in a federal court in another state is an empty avenue except for the wealthy litigant. In those cases all that will have been accomplished is to increase the cost of litigation and substantially inconvenience both parties and witnesses. Therefore, the ABA opposes the enactment of any legislation that would eliminate the right of a resident plaintiff to bring a diversity action.

We call your attention to one more serious disadvantage that would result from either abolishing or curtailing diversity jurisdiction. We would lose the machinery now available, under section 1407 of the Judicial Code (28 U.S.C. §1407), for pretrial consolidation in one district court of multidistrict litigation involving mass disasters, such as airline crashes, when diversity is the only basis for federal jurisdiction.

Few issues of concern to the legal profession in recent years have evoked the uniform and strongly-held views that this issue has. The American Bar Association position of opposition to this legislation is shared by the American Trial Lawyers Association and all 50 state bar associations. The bar's concern is not one of self-interest, as some have charged. The present system of coordinate federal and state jurisdictions has been an important part of our federalism that we should not lightly abandon. No one has yet come forward even to assert, much less demonstrate, that diversity jurisdiction, which had its genesis in the Constitution and has been with us ever since the first Judiciary Act of 1789 (1 State. 73), has ever resulted in any injustice to any litigant.

For the reasons we have discussed, we believe that abolishing that jurisdiction would have a serious, adverse effect on the administration of justice in the United States.

STATEMENT OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA

PRESENTED BY HOWARD A. SPECTER

November 19, 1982

Introduction

Mr. Chairman, my name is Howard A. Specter and I am a practicing lawyer from Pittsburgh, Pennsylvania. I am pleased to submit this statement to the Subcommittee on behalf of the Association of Trial Lawyers of America, of which I am President.

ATLA is the world's largest bar association devoted to trial law. Our members, over 50,000 strong, practice every day in every courthouse in the country, under every sort of jurisdiction and set of procedural rules, and in every manner of dispute. Our clients are, for the most part, individuals who are injured and are consumers rather than corporate or insurance interests. There is no organization less indifferent to problems caused by court congestion and delay in getting to trial, in state or federal court. It is also possible that there is no organization more qualified to assess the daily, real-world impact on American citizens of abolishing diversity jurisdiction. I know there can be no organization more concerned about the attempt to do so.

It is a privilege to articulate some of those concerns. As always, we appreciate greatly the opportunity to be heard in opposition to abolishing diversity jurisdiction. However, to be quite frank about it, we are a bit surprised that the necessity to comment on this unpopular proposal has again arisen.

When the matter came up in the House Judiciary Committee earlier this year, we wondered if there might be some new reason why the rights of citizens who need the protection of the federal court system were being subjected to attack again. We wondered whether a new theory on the origins and purposes of the creation of diversity jurisdiction by the 1st Congress was to be put forth. We wondered if the proponents would be citing new caseload and delay figures to amplify their regular lament about the workload of federal judges and the need to cut back in the name of "judicial efficiency." In short, we wondered if the abolitionists would do any better than they have in previous Congresses in carrying the heavy burden that accompanies the ominous undertaking of making rights fit court schedules.

Although we were denied the opportunity to present a witness, we did attend those hearings as spectators. There was nothing new outside of some incremental changes in the federal court statistics (the record remains essentially bereft of state court statistics). There certainly was no change in position on the subject. The House Committee report acknowledges that fact and adds that "feelings had grown stronger." I can only speak for ATLA in saying that our feelings are not stronger than they have been since the first attempt to close the federal courts to diversity litigants. We cannot be more disturbed now than then; nor shall we be less.

We offer, then, the following statement. It is not dramatically different from earlier statements. Some recent developments are taken into account, but "current events" would have to be inconceivably more momentous for ATLA to overlook the philosophy and arguments we present. There are many ways to improve "judicial efficiency" which are consistent with the purposes of the nation and the needs of its citizens. We list some of them herein. We are on record in support of many of them. They do not offer the "one-fell-swoop" attraction that wiping out diversity jurisdiction does, but then, H. L. Mencken has taught us:

> There is always an easy solution to every human problem--neat, plausible, and wrong.[1]

Making it unnecessary to seek justice in federal court, or making it expeditious when necessary, is neither simple nor easy, but it is right and we support it. Making it impossible to seek justice in federal court is wrong, and ATLA will oppose that attempt with its utmost effort.

The American System of Justice

It has long been known that the measure of a civilization is the system it devises for resolving human conflicts. The civilized society which we have created in the United States measures up very well indeed. We have the most comprehensive system of justice which human history has ever evolved -- a complex of fact-finding and law-interpreting bodies, administrative and judicial, public and private. On the public-judicial side we have city, county, state and federal court systems, providing our citizens with not only an appropriate forum for dispute resolution but, in many instances, with a choice of forums as well. This, we submit, is good and essential to the grand design of the system of justice which we have devised and refined over the last two centuries.

The basic function of government is to serve the people with respect to those societal functions that cannot be provided as effectively by the private sector. Basic among the various governmental services is the court system. And one of the most basic services provided by the federal government is the federal judicial system. To the extent to which it has coexisted with state judicial systems it has always been an alternative rather than a primary or sub-system of justice. It is in the very offering of an alternative -- an option as to dispute resolution -- that the federal government is providing

Diversity of citizenship jurisdiction in the federal courts is the key to the alternative system. Abolish it and you destroy the choice on which so many rights depend. The federal courts have had diversity jurisdiction since 1789. They were created as a parallel, supplementary system because the first Congress recognized the strong possibility of prejudice against out-of-state litigants. Congress very early on recognized that prejudice was reflected in the quality of justice dispensed by the state courts.

Chief Justice John Marshall reflected on this prejudice when he wrote in 1809,

> However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation ... it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies ... between citizens of different states.[2]

We do not say that there have been no abuses of diversity jurisdiction over the course of its history. The abuses, however, such as jurisdictional manipulations to deny states opportunities to pass on matters of their own policy, and the manipulation of cases to put them where the results would be controlled by the choices of court, have been dealt with as they arose.

Over nearly two centuries, the court have grappled with the problems of the day which must accompany the operation of an alternative court system. The conflicts are natural and to be expected. They are reasonable and necessary by-products of a legitimate governmental service, managed at an acceptable price. The United States Court of Appeals for the Seventh Circuit recently held that, under certain circumstances, a federal district court may stay all of its proceedings in a diversity suit pending the resolution of an identical suit in the state court.[3] Without expressing any opinion on the validity of the court's reasoning, we cite the case as an example of the capacity of the courts to address problems they see associated with diversity jurisdiction. The deliberate, case-by-case process of fine-tuning a long-established principle to meet today's requirements continues without abolishing diversity jurisdiction.

The most significant example of how diversity jurisdiction has evolved to meet today's requirements is the way it has been used by the courts to protect citizens from prejudice. It cannot be gainsaid that Americans are more mobile today than yesterday. We must be the most mobile non-nomadic people on earth. As we point out later in this statement, this hardly means that state and regional prejudices have been eliminated. They have not. Yet, diversity jurisdiction need not rely solely on the very real dangers of geopolitical prejudice for its continuation. Diversity jurisdiction has steadily expanded its original justification; it has steadily grown with the identification of other types of prejudice, and the recognition by our federal government of the right to be secure against them.

Much, too, is made of delay in the federal system. Much of the testimony over the last several years has focused on federal court backlogs. Little testimony has been available on the parallel circumstances of the state court system. Yet, on the basis of this incomplete record and on the basis of some bald assertions to the effect that the state courts could handle an increased case load, it was proposed and accepted by many that the alternative federal forum should be destroyed in the name of "judicial efficiency."

We submit that the blind advocacy of "judicial efficiency," must be put in perspective. Court congestion is certainly not a virtue, but it may well be symptomatic of a virtue -- the virtue of the American system of justice which values the calm, deliberative, and thorough protection of human rights above all else.

The fact that the American system has striven for the golden mean between railroading its citizens and starving them out of court was recently put in perspective by a discussion of those two extremes. Leonard Woodcock, the first American

Ambassador to the People's Republic of China, expressed concern over the litigation situation in America in the Spring 1982 issue of Barrister. In so doing, however, he cautioned against imitating the Chinese and Japanese, two societies which are frequently held up as examples of life without lawyers and lawsuits. The "People's Republic of China," Woodcock writes,

> gets high marks for its recent progress, but it is, after all, a totalitarian society concerned more with communal and state needs than with those of individuals. By any American standard, the Chinese legal system does not effectively redress citizen complaints and grievances.

"Japan," Woodcock writes,

> graduates only about 500 lawyers a year, less than 2 percent of those who seek to be lawyers. There are not enough lawyers in Japan to operate an effective justice system. Caseloads in Japanese courts are so much greater than those of American courts that their horrendous delays make ours appear absolutely minimal.[4]

Widely pronounced comparisons with the American system of justice, unflattering to us, were made when it was learned that the recent crash at Tokyo's Haneda Airport of a Japan Air Lines DC-8 resulted in almost no litigation, even after it was discovered that the pilot had a history, known to JAL, of severe psychological problems. As Ambassador Woodcock points out,

> It is said that ordinary Japanese don't sue because they cannot get satisfaction through the judicial system.[5]

The strength of the American system of justice is that our citizens can.

The Burden on the Federal Court System

Senators have heard, over the past 10 years, a litany of testimony by respected federal jurists on how the federal courts are about to burst with cases. The story, however, is not one-sided. To be sure, some courts are crowded and, to be sure, delays exist, especially in some federal courts in major urban centers. The underlying causes of congestion must be individually and calmly examined, however.

The bare facts of how many of the federal civil cases are diversity cases, what percentage go to trial, and how long they take to try cannot be denied, but they can be oversimplified. Each year we buy and assiduously read the statistical studies of federal court case loads, performance, and nature of filings. Over the years, we have been struck by several things. First, diversity cases are not an undue burden upon the resources of the federal courts. The 1982 Annual Report of the Director for the Administrative Office of the United States Courts, which includes statistics through June 30 of this year, shows that 41% of the diversity of jurisdiction cases were disposed of without any court action whatsoever. Of the remaining cases requiring some court action prior to disposition, 42% were disposed of before pretrial and an additional 41% were disposed of before trial. Hence, only 17% of the diversity cases requiring some court action prior to their disposition went to trial.[6]

Of the nearly 160,000 cases closed during the year, the entire federal judicial system heard only 4,400 diversity cases, or 8-1/2 such cases per district court judge for the entire year. About 90% of all non-jury trials heard took only 3 days or less; about 63% of the jury trials were equally brief.[7]

Further, as any lawyer who litigates diversity cases in federal court knows, diversity cases do not delay the disposition of other "priority" cases. The Congress has given various types of civil and criminal cases precedence in handling and disposition.[8] Diversity cases are accorded no such priority. Even if successful, the recent attempt to return to each court the authority to rank types of cases[9] is unlikely to result in diversity cases being moved farther up the line.

One very interesting aspect of the federal court case load was recently brought to our attention. It is claimed that the federal case load has increased substantially. Close analysis reveals that certain types of cases have added significantly to the "backlog" of the federal courts without seriously impacting on the courts' time, however. The newly cited figures are misleading. Specifically, more than 30,000 federal cases were commenced in the statistical year ending June 30, 1982, to recover defaulted student loans and overpayment of veterans' benefits.[10] That represents 3 in every 20 civil actions filed that year. Yet, this 15% of the workload represents almost no work at all. In fact, the disposition of 85% of these cases required no court action at all. The others are disposed of with some court action and the eystem is left with 1/5 of one percent of these cases actually reaching trial; and the trials are short. Consequently, these suits do not justify tampering with diversity jurisdiction.

There is a widely held opinion that better management of existing federal court resources could result in substantial savings in time and effort. The General Accounting Office issued several recent reports pointing out specific areas where improvement is needed.[11] Improvement is possible without additional legislation.

Court administrators and judges have also proposed innovative approaches. For example, it has been suggested that federal court backlogs could be reduced by a more even distribution of the docket. The suggestion is that cases could be assigned numerical values based on the projected length and complexity of a case. By assigning roughly the same point values to each judge, the cases would be equitably assigned and the "backlog" could be reduced.

Some suggestions for reducing the load of the federal courts include relieving judges of many administrative duties. Federal circuit court Judge Alvin Rubin, writing in 1980, opined that administrative matters undoubtedly consume more than 20% of a federal judge's time.[12] The lack of current statistics on this subject, cited by

Judge Rubin, demonstrates in and of itself that more emphasis on modern management principles is required. The Comptroller General has called for more automation in managing the judiciary and has pointed out how better management can ease the civil case "backlog."[13/]

ATLA has never testified against the abolition of diversity jurisdiction without mentioning a number of ways in which a solution to the perceived problem could be constructed; not an easy, simple, and wrong solution, but one consisting of many and diverse components. We encourage the Congress to continue to search for fair and evenhanded methods and procedures for combatting delay and congestion in all courts.

Prominent among current proposals is the welcome idea expressed in the Federal Jurisdiction Review and Revision Commission Act,[14/] that much more needs to be known about the federal court load before any viable solutions can be constructed. We also note the acknowledgement, in the State Justice Institute Act,[15/] that much more needs to be known about the state systems as well. Permanent institutions to monitor the changing scene are required.

We supported the Magistrates Act.[16/] Although its enactment was followed by a period of underutilization of this valuable relief valve,[17/] its importance is now recognized. A recent report by the Judicial Conference suggests several areas into which the work of U.S. Magistrates might usefully be extended.[18/] There are also pending proposals to upgrade many of the part-time Magistrate authorizations to full-time positions.[19/] We urge careful consideration of these proposals. We have supported a system of an increased jurisdictional amount in diversity cases, if the magistrates system could take care of smaller cases adequately. We think it could; the two could go hand in hand.

We have been on record for years as supporting arbitration across the board in smaller civil cases in the areas of medical malpractice and product liability, as opposed to other more complicated civil litigation matters.

We have urged for years the improvement of mandatory pretrial conferences, the idea of mandatory settlement conferences, and other procedural methods of handling problems of delay, as well as proposals changing discovery procedures and other concepts endorsed by the Justice Department aimed at improving judicial efficiency.

It has also long been suggested that Congress consider the preparation of a judicial impact statement before enacting legislation. This statement would estimate the litigation that might be anticipated and the additional judicial resources that would be required to achieve the congressional objective if a bill becomes law. We think the implementation of an impact statement has merit, as long as its purpose is to be used as a tool to understand what is required to adjudicate rights. Impact statements disserve us when they are used to deter the recognition of rights in the name of conserving resources.

It is the effort to conserve judicial resources by denying rights which is the earmark of ill-begotten solutions such as abolishing diversity jurisdiction. A noted consumer advocate and columnist has written:

> The courts must grow and adjust to people's need to use them; people's rights should not be compromised or restricted in order to adjust to the courts' problems. Never should meritorious laws or legislation be conditioned by any predicted added use. The two are separate problems to be considered separately.[20]

Finally, in this discussion of the burden that diversity jurisdiction places on the federal court system, let us put some of the cost figures in perspective.

The Administrative Office of the U.S. Court reports, with understandable pride, that the entire third branch of government constitutes only about one-tenth of one percent of the total federal budget. It has for many years.[21] This represents a bargain of the highest order for the American people. The bargain should not be traded away for convenience.

The abolition of diversity jurisdiction does carry with it the promise of some direct savings to the federal government. The modest economic impact can in no way approximate its societal impact. It certainly cannot improve noticeably on the remarkably low cost of providing civil and justice to a nation. Specifically, the Congressional Budget Office has determined that abolishing diversity jurisdiction would result in direct savings of only six million dollars a year.[22] Taking a six-million-dollar bite out of the $843 million budget for the judiciary may strike some as at least a place to start. ATLA is convinced, however, that if given the opportunity, most American citizens would ante up their two or three cents in order to preserve the right to walk into the federal courthouse and say, "I need your help."

Speculation by the abolitionists about cost avoidance,[23] as opposed to direct savings, does not appear to have been subjected to analysis by the CBO. Trying to forecast litigation and court-use trends five years away can only be speculative, of course, and might easily overlook significant factors. One such factor apparently overlooked by the proponents is the requirement of increased federal subsidy to the state courts to hire additional judges and support personnel, to build additional chambers and courtrooms, and to otherwise make those expenditures necessary to take on 50,000 or more new cases a year. Even in the days before widespread referenda restricting state government spending, representatives of the state court systems made it clear that their readiness and ability to assume these cases depended on Washington's granting them funds with which to do it.[24] They have not said how much it would take.

The Burden on the State Court System

Can the state courts handle all these diversity cases? This question goes both to the number of cases and to the nature of the cases. The proponents rely on the rather bald assertion by the Conference of Chief Justices that the state court systems are "able and willing" to assume all or part of the diversity jurisdiction cases presently exercised by the federal courts. The record of Congressional deliberations on the subject, however, does not support the assertion. There is almost nothing in the record concerning state court statistics.

This omission is not surprising in light of the fact that only are useful data being collected and compiled under the auspices of the National Center for State Courts. The effort is arduous, we are sure, and not always fruitful. We get many of the annual reports from the several states in our offices. Statistics are neither kept nor reported in any uniform way. (We note and applaud a recent announcement by the American Bar Association Section on Litigation that it hopes to work in cooperation with the National Center to convince the states to adopt "timely, accurate, and uniform statistical information systems.")[25]

One thing the National Center for State Courts has contributed to these deliberations has been research on particularly pertinent issues. It has, for example, published findings on the relative impact on state courts of abolishing diversity jurisdiction.[26] The figures reported in the Summer 1978 issue of State Court Journal have been subjected to the criticism of having understated that impact. They, also, have not been updated. Even so, they reveal a picture which gives lie to the long-divisional analysis which states that averaging the diversity cases among all state trial courts results in an insignificant increase everywhere. The "average case load" approach must ignore not only the differences between states but the differences within each state as well. We know that litigation tends to cluster in and around urban centers. Urban center state courts tend to be just as crowded, if not more crowded, than federal courts in urban centers.

The "Relative Impact" study reveals that some twenty states would suffer a disproportionately high impact from the new cases. Seven states, it is reported, would require the creation of new judgeships. Although the authors do generally endorse the Conference of Chief Justices' conclusion that the diversity cases "could be handled in most instances without major additions to state judicial resources," they also call for further studies, emphasizing the need for refinement of the analysis of the impact within each state where the urban "cluster" problem will play such a determinative role. Those needed studies have not been conducted.

Another publication of the National Center for State Courts (in cooperation with the National Conference of Metropolitan Courts), Justice Delayed: The Pace of Litigation in Urban Trial Courts, reinforces the notion that state trial courts in urban areas are already overcrowded. This report examines 21 metropolitan state courts of general jurisdiction to determine the pace of civil and criminal litigation. The study suggests that it is impossible to determine the causes of delay in trial courts and indicates that caseloads and backlogs may very well be affected by the customs of the local bench and bar as much as by anything else. The authors state:

> It is our conclusion that the speed of disposition of civil and criminal litigation in a court cannot be ascribed in any simple sense to the length of its backlog, any more than it can be explained by court size, caseload, or trial rate. Rather, both quantitative and qualitative data generated in this research strongly suggest that both speed and backlog are determined in large part by established expectations, practices, and informal rules of behavior of judges and attorneys. For want of a better term, we have called this cluster of related factors the "local legal culture."27/

This conclusion has recently been seconded by the Rand Corporation. In a report entitled "Speeding Up the Pace of Litigation," the authors report,

> Most participants conceded that control over the pace of civil litigation was largely governed by the presence or absence of strong court efforts from the bench and the bar, which in turn influenced the local legal culture. According to the proceedings, results appeared to be more the product of the individual political leadership skills of judges and other court officials than of specific managerial reforms. Empirical data so far collected show that court reforms--such as increasing the numbers of judges, or improved calendaring, or limiting discovery time or the number of continuances--may have some short-term effects, but may not have lasting results, and may in fact perversely affect the pace of litigation. (Emphasis supplied)[28]

Both sets of authors conclude that the crucial element in accelerating the pace of litigation in a court is concern on the part of those with the problem, and a firm commitment to do something about it. The Rand study, interestingly enough, found that voluntary arbitration, within and outside the court, can expedite civil case disposition. On the other hand, results from mandatory arbitration schemes were more ambiguous.

The authors of Justice Delayed tested the "local legal culture" conclusion by comparing the delay in state courts with the delay in federal court in those same cities. The parallels were significant. Working with what statistics were already available, the authors compared median disposition time for all civil cases in federal court to median disposition time for tort cases in the sister-state courts. (Median disposition time was expressed as the number of days between filing and disposition. A separate inquiry also examined the time between filing and commencement of trial for cases ending in a civil jury verdict.) In the words of the authors:

> There is striking relationship between the scales. ... Time-to-jury trial in the two courts also tracks, although the relationship is less strong. ... Given the considerable difference between state and federal courts in nearly all aspects of caseload,

> structure, and procedures, this relationship in processing times provides strong support for the existence of a local legal culture that affects the pace of civil litigation in both the state and federal courts of a community. 29/

In this comparison, there were four cities for which the state court figures were not available, leaving 17 pairings. In 16 of these, the median disposition time for state courts exceeded that for the federal court. We realize, of course, that "median" measurements can easily be distorted by one or a few extraordinarily delayed or expedited cases, but the disparity in some of the cities is so great as to be noteworthy nevertheless. For example, the median disposition times for Detroit are, state - 788 days, federal - 274 days; for Pittsburgh, state - 583 days, federal - 214 days; for Miami, state - 331 days, federal - 122 days. 30/

Another point made by the authors is widespread public dissatisfaction with the lack of efficiency in the state courts. Fifty-seven percent (57%) of the public is reported to believe "efficiency in the courts" to be a serious national problem, an expression of greater public concern than for pollution, education, racial problems, even the threat of war." 31/ (The statement has reference to state and local courts.)

While Justice Delayed may not conclusively prove that urban state trial courts are already backlogged and slower than the local federal court in the same locale, it does suggest that conclusion rather strongly. The figures also suggest that the existing burdens on state courts must be fully looked at before diversity jurisdiction is abolished. The impact of diversity cases on state trial courts may wind up crippling some already limping horses. "Judicial efficiency" at the federal level will be of little consolation if it is achieved by strangling our state court system.

The absence from the record of meaningful state court statistics reported in a useful format is matched by the absence of support for abolition by state court trial judges. One state, New York, has been particularly vocal in opposing the abolition of diversity jurisdiction, on grounds of the additional burden to be placed on its trial courts. New York court officials, up to and including Chief Judge of the Court of Appeals Laurence H. Cooke,[32] have written that superimposing diversity cases upon the calendars of the New York State courts would place a severe strain on the already overburdened state system. In taking issue with projections of the impact on its courts contained in the "Relative Impact" article, the spokesmen cite the projections as being understated due to their failure to account for the complexity as well as the numbers of diversity cases.[33]

Finally, in regard to the burden on state courts, it should be noted that the federal court system has one great advantage which the states can never have -- transferable resources. Each state's burden is an island unto itself, dependent on "local legal culture," availability of resources, and litigiousness of the society. Even contiguous states with vastly different court calendars cannot help each other. The federal court system, however, can and does move its judges around to meet emergency needs.[34] Recent reports show that this is not done as freely as it perhaps could or should be, but the capacity to solve some of the problem in this way does exist.

The Justice Factors

ATLA's opposition to abolishing diversity jurisdiction is not based on whether the diversity cases are too much for either the federal or the state courts to handle. Early in this statement we referred to the unique system of American justice which offers a choice of forum to those who need it. Trial lawyers value this choice for their clients for a number of reasons.

Diversity jurisdiction was created to permit out-of-state litigants to avoid discrimination founded upon in-state bias or prejudice. We submit that, despite what you have been assured by some with a sophisticated, multi-state, urban practice, that prejudice lives on, and strongly. A U.S. district court judge from the Western District of Texas, writes:

> It is still my opinion that a Brooklyn Yankee driving a Cadillac automobile who has a serious automobile accident with a Boerne farmer of German descent who is driving a pick-up truck cannot expect a fair trial in Comal County (and I can say this from actual experience) whether he be a plaintiff or a defendant.[35]

ATLA knows prejudice exists, as does anyone with hands-on, broad-based experience with the American system of justice and the people it serves. Everyone who has tried diversity-type cases can draw on his or her experience for examples. One problem, of course, is the difficulty in isolating the home-state prejudice from other prejudices which may be subscribed to by those in the locale of the court. Take the above example. Was the Comal County jury anti-Yankee or just anti-Cadillac, pro-pick-up, or maybe even anti-non-German descent? When a Harlem-born doctor sues the sheriff's son in a rural state court in Mississippi, are his chances of getting a fair hearing diminished because he is from New York, because he is black, because he is a doctor?

Diversity jurisdiction has evolved to the point where it protects those who might otherwise suffer from many kinds of prejudice. It is true, as has been pointed out in statements opposing our position, that these protections are available only to those litigants "fortunate" enough to be involved in cases with the requisite diversity of citizenship. Consequently, litigants not so fortunate do not have the same protections and thus may suffer injustice. Is the solution to this the ripping away of the option from those who have it in order to create equal injustice? We think not.

Fortunately, these "justice" factors do not press in large volume on in-state plaintiffs, so preserving diversity for in-state plaintiffs will not have a heavy impact on case load; but they do recur often enough to deserve consideration.

Sometimes, even parties suing in their own states on controversial causes of action might feel the need to have that case heard by a judge who does not have to stand for reelection. The mix of jurors in federal court, while often the same as that in urban state courts, is vastly different from that in rural state courts. The whole balancing process of the jury deliberations is lost when everyone on the jury has similar background, training, and outlook. Not every state has embraced the progressive approach of the Federal Rules of Evidence and Procedure. There is substantial opinion that the state courts have a long way to go before they can tackle the complex multi-state litigation which is handled so well by the federal system.

We do not mean to denigrate any state or state court system. The fact simply exists that the federal courts can sometimes offer protections to those who need them which the state courts cannot.

Delay has already been discussed, but it certainly must be listed among the "justice factors" which go into the decision of whether a client needs the federal court. If the proponents of abolishing diversity jurisdiction were as concerned about litigation delays, *per se*, as they are about *federal* litigation delays, they might see that shifting the cases to state court offers short term relief at best, and may in fact exacerbate the problem.

In some jurisdictions there is now more delay on the federal than on the state side. This may be a relatively recent development. The opposite may have been true but a few years ago. In some states there has always been and still is considerably more delay in state courts than federal. Given a choice of forums, there is a natural tendency for a plaintiff to stand in a shorter line, absent some countervailing consideration of profound impact. A plaintiff seeking redress for a wrong is not likely to wait 3 or 4 years for a federal trial when he can get to court in 12-16 months in state court, unless he would be seriously prejudiced in the available state courthouse by other factors.

So, with the present "choice of forum" system, differences in delay time between state and federal courts tend to be self-adjusting. History demonstrates that these differences are cyclical. The best example is the case of two bank teller lines. If the two windows offer identical services, they will automatically self-adjust. One cannot. If one of the windows offers more services, that line might get longer; but when it becomes too long, judgments will be made, and eventually only those who must be in that line will join it.

The Dangers of an Overspecialized Federal Bar and Bench

Another reason for trial bar opposition to the abolition of diversity jurisdiction may be overlooked by non-practitioners. We trial lawyers see each other all the time in both state and federal court. Quite clearly, a drastic reduction of diversity cases would lead to a federal specialty bar. This would be regrettable. In most states, as a practical matter, both the federal and state systems have benefitted from the free circulation of lawyers and legal ideas between the two. There has always been productive cross-fertilization with respect to desirable procedural practices. This is because under diversity jurisdiction, the trial bar practices meaningfully and regularly on both sides. Limiting diversity jurisdiction would isolate the federal bar and damage the healthy exchange which presently exists.

Additionally, the elimination of diversity cases would take the "people-oriented" cases, and thus the people, out of the federal courthouse and out of the sight and hearing of federal judges. In many jurisdictions, this very tangible symbol of a working "government of the people" would soon house only a sterile atmosphere of lawyers advocating and lawyers judging, debating statutory interpretation and usurping the witness lounges for cartons of computer paper. Soon, a gap will open between those who govern and those who are governed. Inexorably, it will widen until no one but the daily court players will know what our federal courts can do for them.

Opposition to Abolition of Diversity Jurisdiction

Opposition to the idea of total abolition of diversity jurisdiction is shared by most legal practitioners. ATLA, primarily representing the plaintiff's tort bar, is joined in its opposition to a total ban on diversity cases by the state trial lawyers organizations, the American Bar Association, all of the state bars (or their pertinent committees when the bar cannot act), the Defense Research Institute, the American College of Trial Lawyers, railroad counsel and lawyers for the insurance industry. We are not aware of one legal organization whose resolution of opposition we cited in our 1979 statements to the House and Senate committees which has resolved otherwise since then.

A Subcommittee which concerns itself with the issues coming before this one cannot fail to understand the rareness and genuineness of unanimity in the organized legal profession. This opposition stems directly from a concern to provide clients with a fair tribunal to resolve disputes. Ask a trial lawyer if he likes to bring cases in federal court, or likes being removed to federal court, under diversity, and the answer will differ with the jurisdiction, as will the reasons behind it, e.g. delay, inconvenience, better/worse rules, or quality of judges and juries. Ask a trial lawyer if he thinks the availability of the alternative forum has been essential to the pursuit of justice for his clients, and whether he thinks it will continue to be so. We have asked. The answer is "yes."

It does not take a lot of academic soul-searching and hundreds of footnotes. The lawyers who regularly employ diversity jurisdiction, and those who try everything to avoid it, know its value to litigating citizens. They know it on the basis of prevailing conditions and prejudice of the area in which they represent clients. So many know it that, even when subjected to the resolution adoption procedures of fifty state bars and the voluntary groups, it results in unanimity.

Conclusion

Once again, Mr Chairman, we thank you for this opportunity to submit our arguments against the abolition of diversity of citizenship jurisdiction in federal district courts. For the reasons stated above, and in the absence of any new reasons promulgated by the proponents of abolition, we urge you and the Subcommittee on Courts to agree with us that the heavy burden which must accompany such a sweeping denial of rights has not been met. We are prepared to amplify on any statement made in this position paper, or to be of whatever other assistance you may deem appropriate. Thank you.

FOOTNOTES

1. Mencken, Chrestomathy (1949).
2. Bank of the United States v. Deveaux, 5 Cr. (9 U.S.) 61 at 87 (1809).
3. Micro-Software Computer Systems, Inc. v. Ontel Corp., 686 F.2d 531 (7th Cir. 1982).
4. Woodcock, "The Best Lawyer in the World," 9 Barrister 2 at 5.
5. Id.
6. Administrative Office of the United States Courts, Annual Report of the Director, (1982) Table C5A at 253.
7. Id. at 252. Note that figures exclude land condemnation, prisoner petitions and deportation reviews. See also Table C8 at A40.
8. Proposed amendment in the nature of a substitute, the "Omnibus Bankruptcy and Court Improvements Act," by Mr. Dole, 97th Cong., 2d Session, (1982), Part 3 -- Civil Priorities at 7-17.
9. H.R. 6872, 97th Cong., 2d Session, § 1657 (1982), (passed House September 20, 1982, awaiting referral to Senate Committee).

10. Administrative Office of the United States Courts, Annual Report of the Director, (1982) Table C2 at A6.

11. Office of the Comptroller General of the United States, "Better Management Can Ease Federal Civil Case Backlog," GGD-81-2, February 24, 1981.

12. Rubin, "Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency," 55 The Notre Dame Lawyer 648 at 654 (June 1980).

13. Office of the Comptroller General of the United States, "Better Management Needed in Automating the Federal Judiciary," GGD-81-19, April 2, 1981.

14. S. 675, 97th Cong., 1st Session, (1981) (amendment in the form of a substitute offered September 15, 1982; passed Senate October 1, 1982, referred to House Committee on the Judiciary October 13, 1982).

15. S. 537, 97th Cong., 2d Session, (1982) (passed by the Senate on August 10, 1982; referred to the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary August 17, 1982).

16. Federal Magistrate Act of 1979, Pub. L. No. 96-82 (1979).

17. Office of the Comptroller General of the United States, "Better Management Can Ease Federal Civil Case Backlog," GGD-81-2, February 24, 1981.

18. The Judicial Conference of the United States, "The Federal Magistrates System," Summary at IV, V (December 1981).

19. H.R. 7294, 97th Cong., 2d Session, (1982), (Referred to House Committee on the Judiciary).

20. Nader, "The Overloaded Courts," Sunday Star (Washington, D.C.), October 8, 1972.

21. The Administrative Office of the U.S. Courts and the Federal Judicial Center, "Judicial Appropriations Hearings Held," 14 The Third Branch 3 at 1,2.

22. Letter from Alice Rivlin, Director, Congressional Budget Office, to the Honorable Peter W. Rodino, Jr., Chairman, Committee on the Judiciary, U.S. House of Representatives (August 19, 1982) as found in H.R. Rep. No. 97-808, 97th Cong., 2d Session at 15 (1982).

23. H.R. Rep. No. 97-808, 97th Cong., 2d Session at 11 (1982).

24. Federal Diversity of Citizenship Jurisdiction, Statement by the Honorable Robert J. Sheran, Chief Justice, Supreme Court of Minnesota, on behalf of Conference of Chief Justices: Hearings on S. 2094, S. 2389 and H.R. 9622 before the Subcommittee on Improvements in Judicial Machinery of the House Committee on the Judiciary, 95th Cong., 2d Session at 89,90 (1978).

25. Press Release of the American Bar Association, "Litigators Press for Consideration of Mediation and Arbitration Alternatives to Court Trials," Oct. 28, 1982.

26. The National Center for State Courts, "The Relative Impact of Diversity Cases on State Trial Courts," State Court Journal (Summer 1978).

27. The National Center for State Courts, Justice Delayed: The Pace of Litigation in Urban Trial Courts (1978) at 54.

28. The Institute for Civil Justice, The Rand Corp., "Speeding Up the Pace of Litigation ... A Look at the Problems and Prospects for Cutting the Backlog of Civil Cases ... A Summary of Conference Proceedings," (1982).

29. The National Center for State Courts, Justice Delayed: The Pace of Litigation in Urban Trial Courts (1978) at 55.

30. Id. Table 4.1 at 56.

31. Id. at 1.

32. Chief Judge Cooke is the new chairman of the Conference of Chief Justices and the president of the National Center for State Courts. The National Law Journal, October 4, 1982.

33. Letter from Herbert B. Evans, Chief Administrative Judge, State of New York, Office of Court Administration, to the Honorable Robert W. Kastenmeier, Chairman, House Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary (June 7, 1979).

34. Administrative Office of the United States Courts, "Service of Visiting Judges in the United States District Courts During the Twelve Month Period Ended June 30, 1981," Table V-1 (1981).

35. Letter from Judge John H. Wood, Jr., United States District Court, Western District of Texas to Jim D. Lovett, Esquire, Clarksville, Texas, April 3, 1978.

STATEMENT OF
JOSEPH E. FRIEND, ESQ.
PRESIDENT, COMMERCIAL LAW LEAGUE OF AMERICA

Joseph E. Friend, Esq., President, Commercial Law League of America, practices law in New Orleans, Louisiana, and is a partner in the law firm of Dodge, Friend, Wilson & Spedale. The Commercial Law League of America is an organization of approximately 6,000 members of whom more that 85% are lawyers located throughout the United States.

This statement is submitted in response to the Chairman's request for recommendations as to what should be the arrangement within the federal judiciary if bankruptcy courts are reconstituted pursuant to Article III of the Constitution. Pursuant to the authority granted to it under Article I, Section 8, Clause 4 of the Constitution, "Congress shall have Power ... To establish ... uniform laws on the subject of Bankruptcies throughout the United States". With the enactment of the Bankruptcy Reform Act of 1978, Congress exercised that power both to provide a substantive law of bankruptcy and to empower the federal judiciary to adjudicate disputes with respect thereto. However, that portion of the statute providing for the adjudication of disputes in bankruptcy has been held constitutionally impermissible by the Supreme Court in its decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Company, 102 S.Ct. 2858 (1982). Nevertheless, as the Supreme Court stated, Congress has been given "an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication".

As seen by a plurality of the Supreme Court, the issue presented by the dispute in Northern Pipeline was "whether the assignment by Congress to bankruptcy judges of the jurisdiction granted in §241(a) of the Bankruptcy /Reform/ Act of 1978 ... violates Art. III of the Constitution." That plurality concluded that:

> "§241(a) of the Bankruptcy /Reform/ Act of 1978 has impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Art.III district court, and has vested those attributes in a non-Art.III adjunct. Such a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Art.III courts."

102 S.Ct. 2879-2880. However, the concurring Justices did not view the issue presented by that dispute as being so broad because "appellee Marathon Pipe Line Company has not been subjected to the full range of authority granted Bankruptcy Courts by §241(a)." 102 S.Ct. 2881. They felt that it was necessary only to:

> "... hold so much of the Bankruptcy /Reform/ Act of 1978 as enables a Bankruptcy Court to entertain and decide Northern's lawsuit over Marathon's objection to be violative of Art.III of the United States Constitution."

102 S.Ct. 2882.

Both the plurality and the concurring Justices, however, did agree that the jurisdiction invested in the bankruptcy courts was but one aspect of a comprehensive statutory scheme not easily partible. For this reason, the entirety of §241(a) was found to be unconstitutional. The essence of the majority's position, therefore, was that bankruptcy courts as constituted pursuant to the Bankruptcy Reform Act of 1978 could not exercise some portion of the jurisdiction Congress invested in them pursuant to §241(a) of that Act.

Three things either were not discussed in Northern Pipeline or, if discussed, not agreed upon by a majority of the Court: (1) that Congress did not have the power to create independent bankruptcy courts; (2) that Congress did not have the power to invest a federal court with the breadth of jurisdiction found in §241(a) of the Bankruptcy Reform Act of 1978 (viz., 28 U.S.C. §§1471(a) and (b)); and (3) that bankruptcy courts as constituted pursuant to the Bankruptcy Reform Act of 1978 could exercise jurisdiction over only a particular type(s) of dispute(s). The Court's majority, by obvious and logical implication, agreed only that had bankruptcy judges been appointed to serve during good behavior and paid a salary undiminishable by Congress during that tenure, there could have been no objection to such a judge hearing and deciding in the first instance the dispute between Northern Pipeline and Marathon Pipe Line Company. These propositions are the cornerstones for the recommendations we make herein. We believe that they should be the basis for legislation that would reconstitute bankruptcy courts pursuant to Article III of the Constitution.

Previously, we have testified to, and the record before this Committee in many other respects is replete with, reasons why bankruptcy matters should be heard and adjudicated by an Article III court. The overwhelming weight of that testimony is that bankruptcy courts should be reconstituted pursuant to Article III of the Constitution and that there is no practical alternative. The record also speaks loudly and pursuasively of the need for such a court to be an independent bankruptcy court. We will not repeat here what we and others have said in those respects.

Our recommendation to Congress of how bankruptcy jurisdiction should be exercised follows from these six propositions:

1) Bankruptcy courts should be independent cognates of district courts.

2) Bankruptcy judges should be nominated and appointed pursuant to the requirements of Article III of the Constitution.

3) Bankruptcy judges should not be "fungible" within the federal judicial system.

4) The jurisdiction to be exercised by bankruptcy judges (in the bankruptcy courts) should be over all bankruptcy and bankruptcy-related matters.

5) The existing structure of the bankruptcy courts (pursuant to the Bankruptcy Reform Act of 1978) should immediately be abolished and the new structure immediately become effective.

6) Nominations and appointments of Article III bankruptcy judges should allow for confirmations to be staggered over a three-year period. The terms of office for bankruptcy judges sitting at the time of enactment of the new law should be terminated thereby with the provision also made for their continuation in office until succeeded or the office eliminated.

Independent Cognates of District Courts

Pursuant to the ninth clause of Article I, Section 8 of the Constitution, "Congress shall have Power ... To constitute Tribunals inferior to the supreme Court". In its exercise of this power, Congress has created and maintained as the basic organizational scheme for the "inferior" federal judiciary, district courts of first instance and intermediate courts of appeals. Additionally, however, from time to time Congress has created specialized tribunals. Under the (former) Bankruptcy Act of 1898, specialization of the federal bankruptcy judiciary evolved. With the enactment of the Bankruptcy Reform Act of 1978, a specialized bankruptcy tribunal purposely was recognized, continued and provided for. Not only has nothing happened since that time to suggest any need for a re-examination of that decision but, to the contrary, the increase in the workloads of all of the federal courts generally as well as the performance of the bankruptcy courts in particular testify to the wisdom, practicality and efficacy of the specialized bankruptcy court.

The legislative history of the Bankruptcy Reform Act of 1978 deals extensively with the matter of the independence of bankruptcy courts. Here too, nothing has happened since the enactment of that statute to call into question Congress' previous decision to structure bankruptcy courts as independent elements within the federal judiciary; and, again, if anything, the character and quality of the performance of the bankruptcy courts operating since then confirms that decision. But an independent bankruptcy court is not synonymous with a new court system. Providing for that independence does not require the creation of a "fourth tier" of federal courts.

There are a number of matters of facilities, staff, support and services bankruptcy courts can share with district courts which will prevent duplication and reduce the costs of operating the bankruptcy courts. For example, district court jury wheels can serve bankruptcy courts, as can the existing staff of the U.S. Marshal's office. It is not necessary to recite a litany of the administrative aspects of federal courts that analysis would disclose could operate jointly between district and bankruptcy courts to effect cost-savings. An examination of this by the Administrative Office of the United States Courts should produce information upon which an effective cognate relationship between district and bankruptcy courts can be structured without compromising the independence of the bankruptcy courts.

Moreover, an independent bankruptcy court does not require that the perquisites of the office of bankruptcy judge be the same as those for the office of district judge. Matters such as salary, retirement and annuity can be different therebetween. The only thing that should be kept in mind in this regard is that the office must attract the most qualified lawyers.

The most significant of the characteristics of independence for the bankruptcy courts are those that relate to the control those courts must be able to exercise over their assignments, dockets, procedures and clerical operations. Here, again, the record is replete with statements and commentary on why these matters must be within the control of the bankruptcy courts independent from the district courts. It is necessary only to again call attention to the exigencies of bankruptcy matters and how expeditiousness in their treatment lies at the heart of an effective bankruptcy system - as evidenced by the operations of the bankruptcy courts since October 1, 1979.

Article III Nomination and Appointment

Since the Supreme Court in Northern Pipeline made it clear that only a court the judges of which were appointed pursuant to Article III of the Constitution could exercise the jurisdiction Congress (in the Bankruptcy Reform Act of 1978) wanted the bankruptcy courts to exercise, and since bankruptcy judges were not so appointed and Congress continues to want bankruptcy courts to exercise that jurisdiction, amendments to title 28 of the United States Code now must be adopted to provide for nomination and appointment of bankruptcy judges pursuant to Article III. As the Supreme Court stated in Northern Pipeline:

> "The judicial power of the United States must be exercised by courts having the attributes prescribed in Art.III. Those attributes are also clearly set forth:
>
> 'The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.' Art. III, §1."

102 S.Ct. 2865

The most important - and obvious - reason for reconstituting bankruptcy courts pursuant to Article III of the Constitution is the response this provides to the limitations imposed by the Supreme Court in Northern Pipeline. However, there is another very significant reason: the attraction such an appointment would provide for the ablest members of the bar to be willing to be considered for such an appointment (as is the case with the appointments made to the district courts and the courts of appeals).

By and large, the judges now sitting in bankruptcy courts are able, qualified and respected members of the bench and bar - opinions held by colleagues and those appearing before them. Nevertheless, because bankruptcy judges are not Article III judges, there are some (including bankruptcy judges themselves) who do not share those opinions. Because of that and the public vent that sometimes is given to such negative feelings, the dignity and respect for that office that should obtain sometimes does not. This dilutes the effectiveness of bankruptcy courts and their work. Appointment pursuant to Article III should effectively eliminate that impediment to the functioning of an important judicial office.

"Nonfungibility"

Chapter 13 of title 28 of the United States Code provides that judges sitting in one court of the United States may be designated and assigned to sit temporarily in another United States court. It may, therefore, be said colloquially that those judges are "fungible" as between the courts. At first glance this capability of designation and assignment of judges within the federal judiciary adds to the efficiency of the federal court system and, as presently structured, it does. This would not, however, be the case if bankruptcy judges were to be included in this "federal judicial pool".

The desirability of independence and specialization for bankruptcy courts and, therefore, of "non-fungibility" of bankruptcy judges, follows from three fundamental characteristics of the bankruptcy process: (1) the need for efficient decision-making and adjudication on short-notice, frequently several times during the pendency of a bankruptcy case; (2) the applicability of special rules of procedure; and (3) that bankruptcy is a process which, by its very nature, has an ambient administrative character to it. These exigencies of the bankruptcy process militate strongly against bankruptcy judges being designated and assigned to other duties. Not only is it desirable that the bankruptcy judge be available virtually 24 hours a day, 7 days a week, but also that, to the greatest extent possible, all matters involved in a bankruptcy case be heard and decided by the same judge.

A major reform effected by the 1978 Act was the elimination from the responsibilities of the bankruptcy judge the non-judicial aspects of a bankruptcy case. Nevertheless, when disputes do arise which must be adjudicated, the ability of the judge to deal with them within the larger context of the bankruptcy case as a whole contributes immeasurably to the efficacy of the bankruptcy process. Disputes in a bankruptcy case do not arise in a vacuum. Ultimately, what usually is at stake is a "total" financially feasible outcome. Each individual dispute is integrally related to this "total" picture and unless the outcome of the dispute contributes to a financially feasible treatment of the rights of creditors and the debtor, in a manner of speaking, a battle might be won but the war lost. Retaining within the bankruptcy system on a full-time basis those judicial officers appointed for the purpose of dealing with bankruptcy matters allows for the "total" picture to be considered and kept in perspective. Designation and assignment of those officers outside the bankruptcy system significantly dilutes the effectiveness of the system.

Bankruptcy Jurisdiction

Of all of the reasons for Congress to reconstitute bankruptcy courts pursuant to Article III of the Constitution, the most important and compelling is the need for bankruptcy courts to exercise the broadest jurisdiction possible over bankruptcy and bankruptcy-related matters. As stated below, the record is replete with evidence of the significance of such jurisdiction. As we said earlier before this Committee:

> " ... as this Committee itself said during the 95th Congress in its Report on S.2266 and H.R.8200:
>
> > 'A major impetus underlying this reform legislation has been the need to enlarge the jurisdiction of the bankruptcy court in order to eliminate the serious delays, expense, and duplications associated with the currecnt dichotomy between summary and plenary jurisdiction, a wasteful remnant of the referee system left over from the pre-Chandler Act era.'
>
> During its hearings, this Committee heard from nearly 60 witnesses and received several hundred written statements and comments. Those dealing with the matter of jurisdiction of bankruptcy courts were virtually unanimous: bankruptcy courts' jurisdiction had to be expanded. This Committee's statement ... is exemplary of the attitude that prevailed. As Senator Wallop also stated:
>
> > 'The jurisdiction of the courts will be broad and pervasive. No longer will needless litigation in several courts be required to determine all the matters involved in a bankruptcy case.'
>
> In speaking to this subject in its recommendations, the Commission on the Bankruptcy Laws of the United States, in its

> Report, called attention to delay, extra expense and the waste of judicial resources that accompanies bifurcated jurisdiction as being the primary reasons for investing in one court jurisdiction of a scope adequate and sufficient to deal with all matters likely to be at issue in a bankruptcy case.
>
> ... simply stated, the character and scope of jurisdiction given to the bankruptcy courts pursuant to Public Law 95-598 was not a matter of disagreement. And, as far as we can tell today, it still is not questioned."

"Pervasive" jurisdiction reflects the virtually unanimous positions of those who participated in the almost 10-year development of the Bankruptcy Reform Act that an effective and efficient bankruptcy system is one that affords an expeditious consideration and treatment of bankruptcy and bankruptcy-related matters. Time is the enemy of a successful bankruptcy proceeding because of the time value of money and the depreciating value of property.

History demonstrated through the years of experience under the (former) 1898 Act, with its ambiguous distinction between summary and plenary jurisdiction, that determining which forum had jurisdiction to hear a particular matter was costly, time-consuming, wasteful of judicial resources and detrimental to the objectives of a system designed to provide protection and relief in a time of financial distress. Before those objectives could be sought, first it had to be determined which forum had jurisdiction over a particular matter.

"Pervasive" jurisdiction eliminated that preliminary ritual dance. Even those opposed to constituting bankruptcy courts under Article III did not voice opposition to such jurisdiction. However, when the Bankruptcy Reform Act was being considered (as proposed legislation), no agreement between the houses of Congress could be reached as to how bankruptcy courts should be structured. Therefore, a compromise was adopted which, in Northern Pipeline, the Supreme Court declared was improper.

The most forceful argument in support of reconstituting bankruptcy courts pursuant to Article III is the experience those courts have had under the Reform Act since October 1, 1979. They have exercised "pervasive" jurisdiction and there have been no delays of consequence, waste of judicial resources or losses or additional costs to creditors, debtors or others. There has been no uncertainty as to the jurisdiction of bankruptcy courts. This has led to a stability and predictability that has immensely facilitated out-of-court workouts.

Nothing has happened since October 1, 1979 to cast doubt on the Congressional policy that bankruptcy courts should have jurisdiction over all bankruptcy and bankruptcy-related matters.

Practically, the implications are staggering if the Article III solution is not effected. Post-petition lending would come to a virtual stand-still; no potential lender would be satisfied with a borrowing order entered by a bankruptcy judge. There also would be no certainty of the validity of a sale free of a lien. It is even likely that challenges to claims and to an individual's status as a creditor would raise jurisdictional problems.

The Article III solution is the only response Congress can make to Northern Pipeline that the Supreme Court has indicated will enable bankruptcy courts to exercise the jurisdiction Congress sought for them in the Bankruptcy Reform Act of 1978.

Immediately Effective New Court

Protection of the integrity of the bankruptcy system requires that there be no possibility of challenge to the structure and jurisdiction of bankruptcy courts. For so long as Congress fails to reconstitute bankruptcy courts pursuant to Article III such a challenge is possible. Therefore, it is imperative that Congressional action be effective immediately upon the enactment of legislation.

The practical (and possibly constitutional) difficulty that surrounds immediate effectiveness is the need for appointment of more than 200 judges. The appointment process is not one that takes place - or that can take place - overnight. And, the heart of Northern Pipeline is that presently sitting bankruptcy judges were not appointed pursuant to the Article III process: presidential nomination and senatorial confirmation, a process that does take some time. Nevertheless, a reconstituting of the bankruptcy courts pursuant to Article III to take effect immediately would be responsive to and dispositive of the Supreme Court's basic concern for the existing bankruptcy court structure. The fact that immediate effectiveness of the new court structure would not - could not - be accompanied by nomination and appointment of all necessary bankruptcy judges should not pose constitutional problems if (1) it is a structure pursuant to Article III that clearly is provided for and (2) nomination and appointment of all bankruptcy judges begins immediately and is to be completed within a reasonably short period of time. Those considerations were operative in connection with the Article III structure proposed by the House in H.R.8200 (during the 95th Congress). As that body's Committee on the Judiciary stated in its Report:

> " The expansion of jurisdiction of the bankruptcy courts during the transition period while they continue as adjuncts of

> the district courts should not raise any constitutional issues as if the system were permanent. As Mr. Justice Harlan noted in Glidden v. Zdanok, Congress has greater flexibility in establishing a court system for a transitory purpose, where the jurisdiction to be exercised is for a short period and will not become permanent."

H.Rep. 95-595, p.288. We suggest that same prescription would apply here.

After all, the Supreme Court itself found it desirable to stay its mandate in Northern Pipeline and to make it prospective only for the reasons that to do otherwise "would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts ... /and to/ afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws." 102 S.Ct. 2880 (emphasis added) These concerns coupled with the Court's acceptance of a short transition before a fully constitutional structure can be put into place (as in Glidden v. Zdanok) argue strongly for the efficacy of an implementation of an Article III bankruptcy court phased in over several years.

Further, it is suggested that such an implementation is not incompatible with the broad constitutional prescription that lies at the heart of the Supreme Court's judgment in Northern Pipeline. The Court did not determine that the impermissibility of the delegation by Congress to the bankruptcy courts of jurisdiction under P.L. 95-598, §241(a) was tantamount to a denial of due process to a litigant. Contrariwise, the Court saw that case in terms of the basic issue of separation of powers within the federal system. That separation of powers will not seriously, if at all, be threatened or compromised where Congress does provide for bankruptcy courts pursuant to Article III to be effective immediately but the implementation of which through the nomination and appointment of judges thereto would be phased in over a relatively short period of time.

Staggered Appointments

A reasonable and practical solution to the problem of imposing upon the President the need to nominate and upon this Senate the need to consider for confirmation at one time more than 200 persons as bankruptcy judges is that such endeavors be staggered over a period of time. That time must not be so long as to violate the "transition" spirit of which the Supreme Court spoke in Glidden v. Zdanok, nor must it be so short as to offend the capacity to act competently of our governmental institutions. We suggest that time period be three years and that one-third each of the necessary complement of bankruptcy judges be nominated and confirmed no later than June 15 in each of the years 1983, 1984 and 1985.

At the same time, we suggest that the terms of all sitting bankruptcy judges be terminated upon the enactment of the new law but that those judges be authorized to remain in office until succeeded or their office eliminated. Such provision will enable the bankruptcy process to continue uninterrupted and unaffected by the reconstituting of the bankruptcy courts and for Congress to add or delete bankruptcy judge positions as the need presents itself during the next three years.

During its consideration of a phase-in "transition period" for an Article III bankruptcy court, the House, in connection with H.R.8200, studied extensively both the constitutional as well as the practical problems associated with the appointment of bankruptcy judges. We have relied upon that work in framing this recommendation and suggest that it represents thebest judgment brought to bear upon such problems. There appear to be no reasons not to rely upon it at this time. Moreover, there is nothing in Northern Pipeline to suggest that that judgment was faulty in any way. As the Court there stated, the fact that Congress had given substantial consideration to the constitutionality of legislation pending before it "is of course reason to respect the congressional conclusion." 102 S.Ct. 2866

Conclusion

A clear, determinable and predictable judicial route for the adjudication of bankruptcy and bankruptcy-related matters is necessary for an effective, efficient and expeditious bankruptcy system. Presently pending before the bankruptcy courts are approximately 700,000 bankruptcy matters; additionally, there are, as a substantial percentage of those cases, many contested and adversary matters in those cases. This litigation involves more people, more money, more jobs, more potential tax revenues and generally more economic activity than the combined total of all similar matters pending before the remainder of the federal judiciary. Moreover, the national bankruptcy system is the backdrop against which other situations of financial distress are "worked-out" outside the formal structure of the bankruptcy court. The national bankruptcy system is the only national policy for dealing with financial distress; its continued existence and operation must remain unimpaired. Without such clarity, determinability and predictability in the judicial treatment of bankruptcy matters, in the event of litigation, the only possible recourse will be an uncertain jurisdiction exercised by United States district courts whose calendars, in many districts, are as much as 2-3 years backlogged on the civil side.

We believe that the performance of the bankruptcy courts since October 1, 1979, under the Bankruptcy Reform Act of 1978, and the record made before this Committee (and its companion Committee in the House) since that time, demonstrate unequivocally the wisdom of "pervasive" jurisdiction. The Supreme Court has spoken and enjoined that such jurisdiction may be exercised only by a court created pursuant to Article III of the Constitution. Logic and reason compel the conclusion that the bankruptcy courts should be reconstituted as Article III courts.

We have suggested in this statement how and why such an Article III court should be structured. We believe this suggestion reasonably takes into account the exigencies of the bankruptcy process and the values inherent in the legislative process. Should this Committee desire, we will be pleased to provide additional material in support of this recommendation or in response to any question the Committee may have.

November 26, 1982

Statement of
Leslie Cheek, III
Vice President-Federal Affairs
Crum & Forster Insurance Companies

Mr. Chairman and Members of the Subcommittee:

The Crum & Forster Insurance Companies, the Nation's 15th-ranked group of property-casualty insurers, are among those insurers, both here and abroad, which, over a long period of years ending in about 1976, wrote general liability insurance policies for the major manufacturers and suppliers of asbestos and asbestos products.

Many of these companies are now involved in lawsuits with each other and with their policyholders arising out of the tidal wave of asbestos-related claims now inundating the courts. We believe that the protraction of these lawsuits threatens the solvency of the asbestos industry and poses long-term danger to the business of insurance.

The purpose of this statement is to recommend use of the procedural devices available under the Bankruptcy Act of 1978 to bring the asbestos-related insurance litigation to a prompt and conclusive end and to establish a trust fund for the compensation of asbestos claimants.

The dispute in the insurance coverage cases is not whether the involved insurers will honor their contractual commitments, but rather which insurers are liable for asbestos-related disease claims. The dispute is a result of the convergence of very broad policy language with claims for diseases which take a very long time to develop.

The coverage grant in most of the contracts at issue says that the insurer will defend the insured against claims and reimburse him for damages he becomes legally obligated to pay as a result of bodily injury occurring during the policy period.

In the case of acute or traumatic diseases or injuries, "bodily injury" is a clearly evident event, and it is easy to determine when that event "occurred" and, therefore, which policy is applicable to the resulting damages. In the case of chronic or latent diseases or injuries, however, like those arising out of exposure to asbestos fibers, there may be anywhere from 15 to 40 years between a claimant's harmful exposure to asbestos and a clinically-diagnosable illness or disease. In this context, the question is whether "bodily injury" "occurs" at the time of exposure or at the time the disease manifests itself.

If the answer is that bodily injury occurred at the time of exposure, then coverage under one set of insurance contracts comes into play; if the answer is that bodily injury occurred at the time the disease manifested itself, then coverage under a different set of insurance policies is triggered. For either group of insurers, the answer involves millions of dollars.

Thus far, four Federal Circuit Courts of Appeal have examined this question, and each has come up with a different answer: One has held for the manifestation theory of coverage, a second for the exposure theory, a third for the exposure theory with proration of coverage among the involved insurers, and a fourth for a combination of the two which defines bodily injury as a continuum from first exposure through manifestation and thereby triggers coverage under all policies during the period at issue.

The Supreme Court has twice declined to review the asbestos insurance coverage issue, and, although it has never stated its reason for denying certiorari, the Court appears to regard the cases as matters of contract interpretation under State law, and therefore inappropriate for Federal review. See Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

We believe that the Supreme Court will continue to ignore the asbestos coverage issue so long as it remains a matter of State, rather than of Federal, law. We also believe that the absence of a single, nationally applicable rule for the insurance coverage of asbestos-related claims will condemn all parties at interest -- claimants, defendants and insurers alike -- to perhaps a decade of expensive, destructive and ultimately inconclusive litigation.

It is entirely conceivable that each of the eleven Federal Judicial Circuits will frame its own rule for asbestos-related claim coverage, thereby precipitating chaos as claimants' and defendants' attorneys shop for the forum with the most favcrable coverage rule.

More importantly, however, protraction of the insurance litigation will exacerbate a currently disastrous situation. Already, the absence of insurance dollars to pay defense and claims costs has hastened the bankruptcy filings of three asbestos defendants. Further delays in the resolution of the coverage issue may precipitate additional bankruptcies.

Additional bankruptcies, in turn, would add to pressure on the Congress to "solve the asbestos problem" in ways that might threaten the common law tort system, usurp State workers' compensation law, place new burdens on the Federal treasury, or revolutionize the regulation of insurance.

We believe that timely use of the procedural aspects of Federal bankruptcy law to resolve the insurance coverage and other asbestos-related issues would obviate the need for changes in substantive law which might have unpredictable and perhaps undesirable consequences.

We propose that the Federal Bankruptcy Act of 1978 be amended:

(1) to give Federal Bankruptcy Court judges the tenure and salary protections granted District Court judges under Atricle III of the Constitution;

(2) to direct (rather than permit, as current law does) the Bankruptcy Court in which the Manville Corporation's Chapter 11 petition was filed to use its jurisdiction over all "civil proceedings arising in or related to" asbestos-related claims against

Manville to bring all the co-defendants and their insurers into a single forum;

(3) to direct this court to appoint expert special masters to develop rules, to be considered matters of Federal law for the purposes of the legislation, governing:

  (a) the basis of insurance coverage for the asbestos-related claims against all the co-defendants, and

  (b) the proportionate share of each of the co-defendants in the payment of damages for claims as to which they are found, or agree to be held, jointly and severally liable;

(4) to direct this court to establish a trust fund for the payment of asbestos-related claims, both pending and future, fueled by periodic payments from the co-defendants and their insurers based on the rules governing their proportionate contributions; and

(5) to make the trust fund the exclusive source of recovery against any of the co-defendants or their insurers for as long as the trust fund lasts or until all asbestos-related claims have been satisfied.

The rationale of our proposal is as follows:

First, the Manville Corporation, the largest of the asbestos manufacturers, is named as a defendant in the overwhelming majority of asbestos-related suits and thus is a natural nexus for any proposal to deal collectively with the asbestos defendants and their insurers.

Second, the insurance coverage (and any self-insured deductibles or retention amounts) available to Manville's co-defendants is highly relevant to the Bankruptcy Court's assessment of the Manville Corporation's assets, since virtually all asbestos-related claims allege that the named defendants are jointly and severally liable.

Third, since the court must, for its limited purposes, assess both the proportionate liability of all the defendants and the insurance coverage available to these defendants, it seems logical to suggest that this assessment be utilized to achieve, at minimal expense, several additional objectives.

As we envision it, our proposal would work in the following manner:

Pursuant to its Congressional mandate, and utilizing the nexus of the Manville Corporation's Chapter 11 debtor status, the Bankruptcy Court would obtain jurisdiction over Manville's co-defendants and their insurers by virtue of their involvement in litigation "arising in or related to" Manville's petition, as the Bankruptcy Act of 1978 puts it.

Once the co-defendants and their insurers are before the court, the judge would appoint two special masters, one with expertise in the asbestos industry and another experienced in the interpretation of insurance contracts. These experts would be charged with developing, for adoption by the court, rules governing the apportionment of liability among the defendants and the basis for the insurance coverage of the defendants' asbestos-related liability, respectively. Pending the development and final implementation of these rules, all asbestos-related claims against all the defendants would be stayed.

The rule for the defendants could take into account such important variables as regional market shares, number of years in the business, number of outstanding claims, number and amount of claims already paid, etc., in order to assure an equitable distribution of liability.

Similarly, the rule for insurers could reflect amounts and duration of coverage; periods of self-insurance, deductibles and self-insured retentions among insureds; amounts of expense and indemnity already paid; variations in reinsurance arrangements; etc., to assure fairness in the allocation of coverage.

Both rules would be developed in recorded proceedings and would become, upon adoption by the court, decisions upon matters of Federal law, fully appealable through the Federal appellate courts.

Once the Supreme Court had approved the rules, the Bankruptcy Court would implement them to create a trust fund for the payment of all asbestos-related claims against the defendants. The rules should make it possible to determine, with reasonable certainty, how much each defendant and its insurers can, over a period of years ending in 2010 (or any other year after which the number of asbestos-related claims might be expected to become insignificant), contribute to the trust fund on a periodic basis to provide a continuing source of compensation for claimants.

After the trust fund had been established, the court would lift the stay against pending and future claims, and claimants' cases would proceed, as they currently do, in State and Federal courts across the country, to settlements or judgments to be satisfied by the proceeds in the trust fund. Our proposal contemplates no change in the substantive or procedural law upon which these claims may be based, but anticipates that the trust fund would be the sole source of recovery against the involved defendants and their insurers either until it is exhausted, or, as we believe would be possible, all asbestos-related claims have been satisfied.

We see the following advantages in our proposal:

First, it would assure, to the maximum extent possible, the establishment, by the Supreme Court, of uniform national rules governing the insurance coverage of, and the apportionment of liability for, damages in asbestos-related claims. The implementation of these rules would create an assured source of compensation for deserving claimants while forestalling additional bankruptcies in the asbestos industry.

Second, it would dramatically reduce the legal expenses currently associated with compensating asbestos disease claimants.

As things now stand, the industry and its insurers are spending far more on lawyers than on claimant compensation. In multiple-defendant cases, each of a dozen or more defendants must be individually represented at every proceeding, and it costs $80 to put $20 into claimants' hands. In individual defendant cases, plaintiffs' and defendants' lawyers earn $77 for every $70 won by a claimant.

A rule preapportioning liability among the defendants would enable them to be jointly represented by a single lawyer, while a rule governing insurance coverage would eliminate the need for expensive litigation of coverage issues among involved insurers and/or their insureds. This reduction in legal expenses would, by itself, spectacularly increase the resources available, both now and in the future, for the compensation of deserving claimants.

Third, it recognizes that the problems created by the asbestos cases are procedural, rather than substantive, and therefore proposes procedural, rather than substantive, solutions to these problems. It would simply streamline the adaptation of insurance contracts designed for traumatic events to latent diseases, and expedite the allocation of responsibility among defendants held jointly and severally liable for an acknowledged public health disaster of unprecedented proportions.

We offer our proposal in the belief that it would serve the long-term best interest of our industry, as well as the public interest in the fair and prompt compensation of asbestos-related claims and the survival of the asbestos industry, to resolve the insurance coverage and liability apportionment disputes as expeditiously as possible.

We are currently working with other companies in our trade organization, the American Insurance Association, and with other interested parties, toward the development of a common position on the best approach to the issues our proposal addresses. We are confident that the end we share -- a prompt end to unproductive litigation -- assures finding a means to reach it.

STATEMENT OF THE

Investment Company Institute

1775 K STREET N. W., WASHINGTON, D. C. 20006

The Investment Company Institute ("Institute") submits this statement in support of the proposed technical amendments to the Bankruptcy Reform Act of 1978 ("Code") which would exempt certain repurchase transactions ("repos") from the automatic stay and avoidance provisions of the Code. These proposed amendments are presently being considered by the Senate Judiciary Committee along with pending proposals for omnibus bankruptcy legislation. The amendments have been endorsed by the Federal Reserve System, numerous financial and securities institutions, and securities and banking trade associations, all of whom have a vital interest in a viable repo market.

The Institute is the national association of the mutual fund industry and includes in its membership 764 open-end investment companies (mutual funds) registered under the Investment Company Act of 1940, with assets, as of October 31, 1982, of $288.5 billion and approximately 17 million shareholders. This accounts for over 91 percent of the assets of all mutual funds.

Money market mutual funds constitute a significant portion of the mutual fund industry. There are 231 money market funds, whose assets are invested in short-term money market instruments such as securities issued by the U.S. Government and its agencies and instrumentalities, certificates of deposit issued by banks, bankers acceptances, commercial paper and similar instruments.

Repurchase or "repo" agreements are commonly used by money market funds on a short-term basis due to the ease with which dollars can be invested and the recognized safety of the repo transaction by sophisticated participants in the financial markets. However, repos also perform an important liquidity function in the investment portfolios of money market and other mutual funds where they are commonly used as an important method of meeting anticipated needs for cash. As of October 31, 1982, the 231 registered money market funds held repo agreements totaling approximately $19.4 billion. 228 of these funds are members of the Institute. As of October 31, 1982, money market Institute member funds had net assets of $206.6 billion, which constitutes 90 percent of total money market fund assets. Shares in these funds are owned by approximately 10 million shareholders.

It is vitally important to the members of the Institute, and in the public interest and the interest of investors, that the Code be amended to protect the repo market from the serious disruptions which could emanate from the bankruptcy of a government securities dealer or other party holding repos under the Code's present provisions.

Under the Investment Company Act, mutual funds are required to stand ready at all times to redeem shares held by investors, except in specified emergencies. It is absolutely essential, both as a legal and a practical matter, that mutual funds maintain a degree of liquidity sufficient to meet the daily flow of redemptions from shareholders. This is especially true of money market funds which, by their nature, are required to be very highly liquid and are used by millions of investors on a daily basis for investment in and redemption of fund shares. The ability to redeem promptly, at net asset value, is crucial to the operation of these funds and the maintenance of investor confidence. For the twelve months ending October 31, 1982, money market mutual funds experienced redemptions of $512 billion of their shares. During the month of October, 1982, redemptions of shares in these funds reached $52 billion.

The recent failure of Drysdale Government Securities Inc., and the filing of Chapter 11 proceedings under the Code by Lombard Wall Incorporated, another government securities dealer, have generated considerable uncertainty about the treatment of repos under the Code. Essentially, a party holding repo securities runs the risk that it might not be able to liquidate the securities immediately upon the insolvency of the other party, and that margin payments, or amounts received in closing out a repo transaction, might be deemed voidable preferences under the Code. In the past, the repo market has functioned efficiently and well, especially considering its enormous volume and large number of participants. Concern about a possible bankruptcy filing by a repo market participant can only constrict the market and adversely impact those financial institutions which rely on repos to serve their specific needs. It should be noted that a number of these institutions are subject to investment restrictions which may result in these institutions reevaluating their participation in the repo market if legislative relief is not forthcoming.

It is important to note that mutual fund utilization of this very important investment vehicle has decreased in recent months. Outstanding repurchase agreements of money market funds totalled approximately $22.1 billion at the end of August 1982 and represented approximately 9.8 percent of fund assets. At the end of October, outstanding repos are estimated to be about $19.4 billion, $2.7 billion less than the August peak; outstanding repos as a percent of total assets fell to 8.4 percent. It appears that since the end of

October, large holders of repos reduced their holdings somewhat further. Also, the Securities and Exchange Commission is presently evaluating its position on the standards mutual funds must apply to repo transactions. While it appears that mutual funds will continue to have the right to utilize repos, the current negative publicity and legal uncertainties surrounding repos have created an environment which could further reduce fund participation in the repo market.

Since proper use of repos helps the money market funds achieve liquidity and meet shareholder redemption requests, such a result would not be in the best interests of the shareholder public. There is no reason that mutual funds and other institutions with short-term liquidity needs should not be able to engage, with maximum safety, in very short-term transactions, rather than hold fallow cash. The proposed bill would allow this participation by amending the Code to assure that participants in the repo market are afforded the same treatment with respect to the stay and avoidance provisions of the Code, in connection with certain repurchase agreements, that Public Law 97-222, enacted July 27, 1982, explicitly provided for stockbrokers, securities clearing agents, commodity brokers and forward contract merchants in connection with securities contracts, commodity contracts and forward contracts. At present the Code can be read to cover certain participants in the repo market, such as stockbrokers, and not others. The repo amendments would protect the contractual rights and obligations of parties to repos, and would not expand substantive contract law.

The Institute recognizes the legitimate interests of debtors and the importance of the Code's statutory scheme which is designed to protect both debtors and creditors.

However, in the case of repos, as with the case of securities contracts and the parties protected by Public Law 97-222, the certainty and fluidity needed by professionals on both sides of the transactions is of such importance that one debtor's filing of a petition should not be permitted to impair the functioning of the market as a result of the Code's automatic stay, or have the integrity of contract relationships upset by the Code's avoidance provisions.

Perhaps even more importantly, the repo market is an integral part of a sophisticated system through which small investors assist in financing the national debt. Savings bonds, which traditionally have served this functions, are no longer a viable option for the millions of investors desiring a better return on their investment dollars. Government securities money market funds, which utilize repurchase agreements, have provided investors with this higher return while at the same time keeping their investment dollars invested in government securities. The development of this system is a classic example of private industry and the government working in tandem to achieve a laudable social goal. Now, as a result of a small, unintentional "glitch" in the law, this entire system through which important public needs and legitimate private interests are being well served, may be unnecessarily disrupted. If the legal uncertainties surrounding repos are not resolved, it might be necessary to develop less efficient and more costly substitutes. The Institute believes that the proposed legislation is the answer to this problem.

It should be stressed that the legislation is technical, non-controversial, and could be enacted at no cost, but with some benefit, to the government. Therefore, we respectfully urge that the proposed legislation be enacted as soon as possible.

STATEMENT OF THE PUBLIC SECURITIES ASSOCIATION ON BANKRUPTCY AMENDMENTS RELATING TO REPURCHASE AGREEMENTS

INTRODUCTION

The Public Securities Association ("PSA") appreciates the opportunity to submit this statement in support of corrective legislation which would clarify the status of repurchase agreements ("repos") under the Bankruptcy Code.

We share the view of the Federal Reserve Board that adoption of legislation permitting the timely and effective liquidation of repos and their underlying obligations or securities is necessary to avoid the possibility of serious disruption in the repo market. Consequently, PSA strongly supports legislation proposed by the Federal Reserve Board to afford participants in the repo market the same protections with respect to the stay and avoidance provisions of the Bankruptcy Code that Public Law 97-222 explicitly provides stockbrokers, securities clearing agencies, commodity brokers and forward contract merchants in connection with securities contracts, commodity contracts and forward contracts. The current Congressional review of other major problem areas in the Code offers an immediate opportunity to achieve prompt enactment of this proposal.

PSA is the national trade association representing approximately 300 banks, dealers and brokers that underwrite, trade and sell U.S. government and federal agency securities, state and local government securities, and mortgage-backed securities. In addition, 35 of the 36 primary dealers in government securities, as recognized by the Federal Reserve, are PSA members.

The events of the past six months, particularly the failure of Drysdale Government Securities, Inc., and the reorganization of Lombard-Wall, Inc., have significantly altered the assumptions of many market participants concerning the level of risk inherent in repurchase transactions. In the Lombard-Wall proceeding, Bankruptcy Judge Edward T. Ryan (S.D.N.Y.) indicated in a September 16, 1982 bench ruling that certain repos involved in that case are to be treated for purposes of the Bankruptcy Code as "secured transactions". Such a characterization cast considerable doubt on what most participants in the repo market previously had assumed was the ability to liquidate a repo agreement notwithstanding the bankruptcy of the other party.

The uncertainty which prevails as a result of these developments not only threatens the continued efficient functioning of the repo market, which is the largest capital market in the world, but also raises questions as to the continued effective operation of the markets for both U.S. government and municipal securities.

DEFINITION OF A REPO

A repo is technically an agreement which comprises two distinguishable acts, but is part of a single transaction. Securities, most often U.S. government and/or federal agency securities, are sold by the first party (e.g., a securities dealer or dealer bank) to a second party (e.g., a customer), with a simultaneous agreement that the first party will repurchase the same, or substituted, securities on a day certain, for a price certain, plus interest or its equivalent at a specified rate. A reverse repo is merely the mirror image of a repo transaction. In a reverse repo, securities are purchased by the first party with the simultaneous agreement of the second party to repurchase the same or substituted securities.

HISTORY AND DEVELOPMENT OF THE REPO MARKET

Repos were first used in the 1920's as a financing vehicle for interbank borrowing. In the 1950's, they began to be used as an alternative means of facilitating dealer financing. In 1969, Federal Reserve Regulation D was amended to specifically exempt U.S. government and federal agency securities subject to a repurchase agreement from reserve requirements. Since then the repo market has flourished.

The development of repos has proven to be advantageous to the financial markets. Participants in this market are provided with an instrument which offers combined characteristics of risk, maturity, flexibility, and liquidity not previously offered by other short-term money market instruments. Repos are typically backed by government securities or other money market instruments and are adaptable for a wider range of uses than most other financial instruments. Any person or firm may deal in repos, while participation in the federal funds market is limited to commercial banks, mutual savings banks, savings and loan associations, and federal agencies. Repos can be arranged for any maturity, while certificates of deposit (an alternate source of funds to banks) usually are not issued for less than 30 days, and commercial paper is seldom written for a period as brief as a day or two.

By providing a mechanism through which large supplies of liquid balances are loaned daily, the repo market has improved the ability of the economy to direct short-term funds into areas of greatest demand. Thus, repos enhance the efficient allocation of resources in the capital markets.

In addition, repos have increased the liquidity of the instruments used as collateral, including longer term government and agency obligations. The securities become more liquid since they may be used to raise funds on short notice without incurring the risk of capital loss that might occur if an outright sale were the sole option.

Finally, repos facilitate arbitrage between financial instruments, as well as provide a straightforward source of cash or investment outlet for short-term funds. For example, repos have broadened the sources of securities available to traders active in short selling. In addition, repos can be used during a period of rising interest rates to supplement the yield on portfolios by allowing investors to invest in higher-yielding instruments without having to sell outright and take a capital loss on the securities in the portfolio.

THE IMPORTANCE OF THE REPO MARKET

The repo market is of critical importance to the U.S. capital market system. The importance of this market is due not only to its enormous size but to the wide range of institutional participants which derive benefits from the use of repos.

Most importantly, the Federal Reserve Board, through its Federal Open Market Committee and the Open Market Desk at the Federal Reserve Bank of New York, uses the repo market as a tool to execute domestic monetary policy. The Fed typically uses repos either to drain reserves temporarily (by selling securities) or to inject reserves temporarily (by buying securities) into the banking system. The Fed also uses repos to invest the funds of about 140 foreign central banks for which it provides a variety of banking services. In 1981, the New York Fed reports that its Domestic Trading Desk entered into $111 billion of repo transactions for Federal Reserve monetary policy purposes and $88 billion on behalf of official foreign accounts.

Second, government securities dealers regularly acquire funds in substantial amounts in the repo market to finance their new issue underwriting and existing inventory positions, especially in U.S. government securities. It is estimated that the "primary dealers" of U.S. government securities (consisting of 12 dealer banks and 24 securities firms reporting to the Federal Reserve Board) engage in repo transactions amounting to between $25-30 billion on any given day.

Third, institutional investors correspondingly invest funds (either for their own accounts or on behalf of others in their fiduciary capacity) totaling many billions of dollars in the repo market. These investors include mutual funds, pension funds, state and local governments, commercial banks, thrifts, corporations and other securities dealers, which have used the repo market in this manner to invest surplus cash. The ultimate beneficiaries of these investments include tens of millions of pension fund participants, money market fund shareholders, and state and local taxpayers all across the country.

Fourth, both institutional investors and government securities dealers are able to provide securities in the repo market for a limited period of time, while continuing to realize a yield on their original investment. This is generally accomplished by investment of the funds received in an alternative money market instrument bearing an interest rate higher than the rate on the repo, thus realizing an arbitrage spread profit.

Fifth, both institutional investors and government securities dealers use the repo market to acquire securities from other participants in the market for a limited period of time. These transactions enable a participant to make delivery of securities already sold but not immediately available, *e.g.*, to cover a short position.

The effectiveness of the repo market to serve all of these functions in the money market depends upon a high level of certainty about the ability of the various repo participants to close out repo transactions in the event of insolvency of the other party to the transaction, and to assure that repo transaction payments previously received from that party will not be reclaimed by the trustee under the Bankruptcy Code. The absence of such certainty not only casts a cloud over the future health of the repo market, but creates a risk of market "grid-lock" should a repo participant become insolvent. This risk arises from the interconnected chain of transactions that typifies the use of repos. A single security may be transferred subject to a repo agreement and then may be retransferred in another repo entered into by the transferee. This process may be repeated several times. Failure by any party in the chain to carry out its obligations thus can tie up the capital of numerous other parties and lead to serious disruption of the market.

THREATS TO THE REPO MARKET

The rapid growth in activity in the repo market has, until recently, taken place without disruption from losses due to insolvencies, other credit-related difficulties or market manipulations. However, there are now indications that the uncertainty created by Lombard-Wall and the other events described above may lead to a contraction in repo market activity. There already appear to have been serious internal changes in the structure of the repo market. For example, a preliminary sampling of PSA members suggests that the proportion of repos entered into by state and municipal governments and public authorities and the proportion of transactions with non-dealer customers may be contracting considerably. Moreover, recent regulatory events have created the prospect that a significant contraction in the use of repos may occur in the weeks and months ahead.

Regulatory and Rating Agency Actions: In the wake of the Lombard-Wall proceeding, the increasing uncertainty as to the rights of repo participants has led public officials and rating agencies to take actions that are likely to lead to a further deterioration of the repo market. These include the following:

(a) In September, 1982, Standard & Poor's Corporation announced that effective immediately, it will not rate "structured municipal issues" which permit investment of bond or note proceeds in repurchase agreements with government securities dealers not rated by S&P. Financings that permit repos with banks and thrifts (whose liquidation is not covered by the automatic stay provisions of the Bankruptcy Code) will continue to be rated.

(b) On October 25, 1982, HUD released a memorandum precluding public housing authorities and FHA-Approved Mortgagees for Multifamily Projects from investing funds in repos. It noted that this order would remain in effect until the legal questions regarding the ownership of the securities used as collateral in repos was clarified.

(c) On November 4, 1982, the Securities and Exchange Commission's Division of Investment Management, in a memorandum to Chairman Shad, indicated that it would revise a previous "no action" position regarding repos and require that investment company boards of directors, to the extent practicable, evaluate the creditworthiness of the brokers or dealers with which they propose to engage in repo transactions and that it would require that government securities money market funds which advertise that their portfolio securities are government guaranteed disclose substantial investments in repos.

Effects To Date

The repo market is now in the process of adjusting to these events. It is still too early for reliable statistical information to reflect fundamental changes in the market. It should be noted, however, that market conditions have generally been favorable in recent weeks, thus probably slowing the rate of change. In addition, it appears that many participants are staying in the repo market on the assumption that corrective bankruptcy legislation will be passed in the near future. Nonetheless, there are indications that sharp changes may be impending. Preliminary responses from a sample of PSA members tend to indicate that:

- Transactions by state and/or municipal governments and public authorities, as a percentage of total transactions, appear to be declining. The same appears to be true of transactions by pension funds and by commercial banks (acting on their own behalf and as fiduciaries). In addition, the total volume of transactions by these customer categories appears to have declined.
- There appears to be decreasing participation by smaller government securities dealers in the repo market, with apparent contractions during the period covering the collapse of Drysdale (5/12/82) and the reorganization of Lombard-Wall (8/17/82). In addition, there are indications that the smaller dealers have suffered a substantial decline in their customer base. Their customers appear to be transacting more repo business with the larger of the primary dealers.
- The proportion of repo transactions entered into with non-dealers (mutual funds, pension funds, state and municipal authorities, etc.) appears to have substantially decreased since May 1. This would mean that external sources of repo funds to finance the inventories of government securities are diminishing.
- As a corollary to the foregoing, the proportion of bank loans is increasing substantially as a factor in dealers' financing of inventories. The New York

Fed's[1] figures show that the absolute level of dealer bank loans rose from approximately $2.1 billion on May 5, 1982, to $4.1 billion on October 13, 1982. During the same period bank loans as a percentage of total dealer positions in U.S. government and money market securities rose from 8.9% to 18.3%. This greater use of bank loans serves to increase dealer cost of financing because bank loans are a more expensive form of financing than repos. Effects on the repo market to date, while highly significant, merely foreshadow the changes that appear imminent. For example, it is reported (although it is too early for available figures to demonstrate) that many mutual funds have sharply reduced their repo investments in the past few days, and mutual fund executives are predicting even greater decreases in light of the SEC's proposed action.

Future Effects

If the indications discussed above reflect market trends and such trends continue, various adverse effects may be expected to occur. One effect would be an increase in the cost of financing the public debt. If dealers in government securities must find alternatives to repos to finance their inventories, these alternatives, such as bank loans, will almost certainly be more costly to the dealers and will ultimately increase the yield such dealers will have to seek in purchasing securities from the government.

A fundamental alteration in the structure of the government securities market may also occur should this issue remain unresolved. For example, investors (such as money market mutual funds) may seek directly to purchase short-term Treasury obligations instead of taking short-term repo positions in long-term government obligations. This may compromise the liquidity of longer term government securities. Such a phenomenon may create difficulty for the United States (and U.S. government agencies) in placing longer term obligations. In addition, this could promote increased volatility in the short-term market as institutions purchase and sell large quantities of short-term instruments.

---

[1] Table I contains New York Fed figures as summarized by Merrill Lynch.

Other adverse consequences could include concentration in the market for government securities and the gradual disappearance of smaller dealers from that market.

CONCLUSION

The repo market plays a critical role in our domestic capital market both as a source of the funds and securities required for the efficient operation of the primary and secondary market in U.S. government securities and money market instruments and as a money market investment vehicle in itself. Any constriction of the repo market resulting from uncertainty as to its legal status would increase costs for many groups of participants in the capital markets, deprive many investors of a vehicle that is not only profitable but also uniquely capable of minimizing market risk, diminish the capacity of dealers and investors for absorbing the new debt issues required to meet public and private demand for credit, and damage the ability of market-makers to provide liquidity to the secondary market for government and other securities.

There are preliminary indications that such a constriction already has begun to occur and that it could become significantly more severe in the weeks and months to come. Early Congressional action could avert this danger. Therefore, PSA urges the Congress to promptly consider the Federal Reserve Board's proposal.

TABLE I

FINANCING BY U.S. GOVERNMENT SECURITIES DEALERS

(IN BILLIONS OF DOLLARS)

TOTAL DEALER OUTSTANDINGS

	ALL CUSTOMERS		EXCLUDING TRANS. * WITH OTHER DEALERS		DEALER BANK LOANS	U.S. GOV'T AND MONEY MARKET SECURITIES		
	Reverses	Repos	Reverses	Repos		Total Dealer Positions	Bank Loans As A % of Total Dealer Positions	
DEC. 30 81	80.098	101.347	33.109	45.323	1.971	20.683	9.5%	
JAN. 6 82	74.016	93.299	30.202	44.591	1.604	23.536	6.8	
JAN. 13 82	71.440	89.049	29.501	40.982	1.904	18.486	10.3	
JAN. 20 82	73.778	88.051	30.078	39.386	1.553	14.607	10.6	
JAN. 27 82	71.319	84.052	28.986	36.408	1.486	14.780	10.1	
FEB. 3 82	72.872	86.532	28.210	35.585	1.578	13.896	11.4	
FEB. 10 82	67.796	80.293	26.901	34.116	1.083	14.016	7.7	
FEB. 17 82	68.526	83.120	26.901	37.346	0.872	11.428	7.6	
FEB. 24 82	68.500	78.305	26.822	35.045	1.712	16.740	10.2	PRE-DRYSDALE
MAR. 3 82	64.177	78.341	23.879	33.415	1.721	19.899	8.6	
MAR. 10 82	69.589	85.846	24.556	36.390	1.440	24.694	5.8	
MAR. 17 82	69.094	91.696	30.925	46.501	1.463	21.704	6.7	
MAR. 24 82	67.256	89.437	27.844	46.141	1.702	24.894	6.8	
MAR. 31 82	66.649	89.537	26.745	46.720	2.018	25.098	8.0	
APR. 7 82	70.256	92.884	30.532	49.145	3.168	28.047	11.3	
APR. 14 82	69.536	91.708	30.052	49.395	1.718	26.847	6.4	
APR. 21 82	75.368	97.420	30.754	51.278	2.382	25.509	9.3	
APR. 28 82	81.906	103.532	35.619	53.060	1.443	23.739	6.1	
MAY 5 82	79.855	101.711	34.609	55.324	2.077	23.460	8.9	
MAY 12 82	78.340	103.008	34.072	54.382	2.426	27.543	8.8	
MAY 19 82	70.709	96.929	32.257	52.674	2.524	28.026	9.0	
MAY 26 82	67.311	92.578	27.518	48.465	2.652	31.738	8.4	
JUN. 2 82	65.012	91.604	27.785	46.899	2.991	29.990	10.0	
JUN. 9 82	63.873	89.400	27.504	47.558	2.318	28.564	8.1	REFLECTS DRYSDALE
JUN. 16 82	61.372	86.542	27.083	45.760	2.478	27.873	8.9	
JUN. 23 82	66.055	87.373	27.919	46.428	2.102	22.850	9.2	
JUN. 30 82	70.937	90.015	31.285	47.671	2.422	22.021	11.0	
JUL. 7 82	69.771	90.102	32.228	49.388	1.919	22.451	8.5	
JUL. 14 82	68.078	88.911	28.656	56.347	2.133	27.925	7.6	
JUL. 21 82	71.610	91.582	28.336	47.093	3.011	26.916	11.2	
JUL. 28 82	76.650	99.330	28.457	50.515	3.294	28.495	11.6	
AUG. 4 82	80.395	100.018	27.955	47.826	4.093	26.991	15.2	
AUG. 11 82	77.435	99.135	26.872	46.611	2.037	27.176	7.5	
AUG. 18 82	79.846	97.948	27.491	45.998	3.680	25.480	14.4	
AUG. 25 82	81.809	98.937	26.729	44.726	2.698	19.726	13.7	REFLECTS FILING IN LOMBARD-WALL
SEP. 1 82	81.457	97.516	25.473	42.970	3.435	17.611	19.5	
SEP. 8 82	77.182	92.519	24.998	42.264	3.387	20.625	16.4	
SEP. 15 82	79.855	96.468	25.165	43.619	3.470	20.184	17.2	
SEP. 22 82	82.521	96.548	26.727	44.821	3.563	18.230	19.5	
SEP. 29 82	80.721	96.745	25.568	44.487	4.343	18.536	23.4	REFLECTS LOMBARD-WALL BENCH DECISION
OCT. 6 82	78.218	91.531	23.940	40.578	4.153	19.961	20.8	
OCT. 13 82	78.666	95.735	25.648	43.918	4.144	22.703	18.3	

STATEMENT OF
HARVEY R. MILLER
WEIL, GOTSHAL & MANGES

ON BEHALF OF
OWENS-ILLINOIS, INC.
CELOTEX
EAGLE-PICHER INDUSTRIES, INC.
H. K. PORTER COMPANY, INC.
KEENE CORPORATION
LAC D'AMIANTE DU QUEBEC LTEE.
OWENS CORNING
PITTSBURGH CORNING CORPORATION
ROCK WOOL MFG. CO.
SOUTHERN TEXTILE CORPORATION

Mr. Chairman:

My name is Harvey R. Miller of the New York law firm of Weil, Gotshal & Manges, special counsel to Owens-Illinois, Inc., a Toledo, Ohio, based corporation. I appear in support of a proposed technical amendment to section 1123(b) of the Bankruptcy Code. The proposed Amendment (a copy of which is attached hereto) is designed to clarify existing law so as to provide for the resolution, as part of a bankruptcy reorganization, of certain tort and other claims involving multiple parties including the debtor. The Amendment is supported not only by Owens-Illinois, Inc. but also by Keene Corporation, Pittsburgh Corning Corporation, Lac D'Amiante du Quebec Ltee., Celotex, Owens Corning, H. K. Porter Company, Inc., Southern Textile Corporation, Eagle-Picher Industries, Inc., and Rock Wool Mfg. Co.

Each of the above corporations supporting the proposed Amendment has been faced with massive tort litigation involving alleged asbestos-related injury. As the testimony before this Subcommittee on November 10, 1982 indicates, this litigation, involving thousands of separate actions, has already forced the major asbestos co-defendant, Manville Corporation, to seek the protection of the federal bankruptcy law. The proposed Amendment would clarify existing law to enable resolution of these and other claims through the establishment of a single settlement fund to which the debtor and non-debtor co-defendants contribute, without requiring separate, expensive and protracted litigation in multiple forums against the contributing co-defendants, and would assist in eliminating unnecessary potential filings for reorganization under the Bankruptcy Code.

Chapter 11 has traditionally been a means for resolving claims in one forum and of evenly allocating monies among recognized claimants in a manner which obviates the inequities of the "first come first serve" basis of ordinary litigation. Further, through the vehicle of a single chapter 11 plan, the high transaction costs normally attendant to the disposition of claims on a case-by-case basis as well as the overburdening of the courts could be obviated. The proposed Amendment enables the parties to negotiate and implement, on a voluntary basis, a chapter 11 plan that could simplify the disposition of mass claims in cases involving multiple parties.

The proposed Amendment would:

- Clarify the authority under chapter 11 of the Bankruptcy Code to provide for the settlement or adjustment of such claims, including personal injury and property damage claims, against the debtor and others through a chapter 11 plan;

- Permit, but not require, that settlement of such liquidated, contingent, or unliquidated claims be provided for through the creation of a fund;

- Permit, but not require, persons liable along with the debtor as to such claims, to contribute to the fund;

- Permit, but not require, holders of such claims to participate in the benefits of the fund;
- Require holders receiving the benefits of the fund to release the debtor and persons contributing to the fund from all related claims so settled or adjusted; and
- Require those persons who contribute to the fund to release other contributors from all related claims so settled or adjusted.

The proposed Amendment is intended to be limited in scope and does not address or deal with the Marathon* jurisdictional issue. That jurisdictional issue, it is presumed, will be resolved by appropriate other amendments to the Bankruptcy Code. The proposed Amendment is needed since, even apart from the Marathon issue, it is currently unclear whether related claims against a debtor and non-debtors may be dealt with in a single chapter 11 plan if the non-debtors agreed to participate and claimants received consideration from such non-debtors. The proposed Amendment would allow a chapter 11 plan to be a flexible vehicle to deal with related claims, e.g. joint tort-claims, on a voluntary basis at substantial savings for the parties involved and the entire court system.

As stated, the Amendment contemplates a consensual arrangement--the essence of chapter 11. Only non-debtors contributing to the fund would be entitled to release of claims against them and only those claimants who actually participate in the fund would be required to release such contributing entities. Similarly, only those entities that contribute to the fund would be required to release other contributors from claims related to those released by the fund participants.

---

*. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., et al., 102 S. Ct. 2858 (1982).

Significantly, the proposed Amendment would enable a chapter 11 plan to resolve tort and other litigation in a manner that:

- Provides more monies to claimants since contributions from non-debtors, as well as monies of the estate, would be available for distribution;
- Equitably allocates distributions among present and future claimants who suffer from similar injuries;
- Largely eliminates the huge transaction costs associated with mass litigation, thereby assuring that more of every dollar spent goes to injured parties; and
- Relieves the massive pressure on the court system imposed by piecemeal resolution of such litigation.

The proposed Amendment would maintain the negotiation and consent among parties (plaintiffs, defendants, debtors) that is characteristic of chapter 11. Any plan would still have to satisfy the standards for confirmation applicable under other provisions of the Bankruptcy Code. Basically, the legislation would provide the means for the parties to resolve complex litigation among themselves, within the context of chapter 11, in a manner that is equitable, efficient, and funnels the largest amount of funds into the hands of recognized claimants.

The Amendment properly leaves to a case-by-case development the exact mechanism for ensuring the adequacy of the fund and manner for presenting claims against it. The fairness of the fund concept would be tested on a case-by-case basis through the confirmation process and judicial scrutiny and review. In practice, in the mass tort context, persons (including governmental entities) potentially liable along with the debtor could evaluate the high costs of tort defense, the uncertain potential results and elect to augment the fund--thereby taking money spent to pay lawyers and spending it instead to deliver benefits to tort claimants. Such claimants would be faced with a choice, as well; they could evaluate their claims against the debtor and elect to "settle" those claims, receiving benefits provided not merely by the debtor, but greater benefits provided by the debtor's co-defendants, or they could continue to assert their claims against the co-defendants and not assert claims against the debtor. This non-coercive mechanism virtually assures that only where the debtor is an important "target" defendant and only where the fund is adequate, would claimants opt into the fund.

For the debtor and co-defendants, payments into the settlement fund would be deemed reasonable settlements made in tort litigation generally, and insurance coverage would exist to the same extent as if the settlement has been made in the more conventional context.

The Amendment recognizes that, in practice, bankruptcy procedures are settlement-oriented, and provides an optional way in which to use those procedures, without complicated overriding federal legislation on substantive matters, to create a fund to settle mass tort claims sufficiently serious to have produced at least three bankruptcies among defendants. The Amendment would encourage, but not require, resolution in one forum at one time. Currently, claimants must assert and litigate their claims against the debtor in the bankruptcy court unless other relief is obtained. Similarly, co-defendants must defend the claimants' lawsuits in one court, and assert contribution and indemnity claims against the debtor in the bankruptcy court, resulting in duplicative litigation. A statutory provision allowing for a plan with an adequate fund will increase the likelihood of resolving all claims in one proceeding or at least through one common mechanism.

In summary, the Amendment merely provides a potential vehicle or option for the debtor, claimants and co-defendants, in an essentially voluntary way, to deliver benefits efficiently to those who need them most. A likely incidental benefit of such a plan would be the unclogging of courts now wrestling with litigation which can never be fairly resolved when an important potentially liable defendant is in chapter 11.

PROPOSED ADDITION TO SECTION 1123(b) OF THE BANKRUPTCY CODE

1123(b)

(5) provide for the settlement or adjustment of claims, whether or not contingent or unliquidated and as to which the debtor may be liable (singly, jointly, severally, comparatively, or otherwise) by the creation of a fund or other settlement provisions requiring the holders of such claims and any other entities that contribute to the fund or to the implementation of the settlement provisions, as a condition to participating in or contributing to the fund or other benefits of the settlement provisions, to release the debtor and the contributing entities from all present and future claims based upon or related to the claims so settled or adjusted.

○